



General Assembly

Distr.: General
9 August 2012

Original: English

Sixty-seventh session

Item 70 (b) of the provisional agenda*

**Promotion and protection of human rights: human rights
questions, including alternative approaches for improving the
effective enjoyment of human rights and fundamental freedoms**

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted in accordance with Assembly resolution 65/208.

* A/67/150.



Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

Summary

In States in which the death penalty continues to be used, international law imposes stringent requirements that must be met for it not to be regarded as unlawful. In the present report, the Special Rapporteur considers the problem of error and the use of military tribunals in the context of fair trial requirements. He also examines the constraint that the death penalty may be imposed only for the most serious crimes: those involving intentional killing. Lastly, he considers the issues of collaboration and complicity, in addition to transparency in respect of the use of the death penalty.

Contents

	<i>Page</i>
I. Introduction	3
II. Activities of the Special Rapporteur	3
A. International and national meetings	3
B. Visits	4
III. Restrictions on the death penalty	4
A. Introduction	4
B. Fair trial guarantees	7
C. Most serious crimes	8
D. Collaboration and complicity	14
E. Transparency	19
IV. Conclusions	23
V. Recommendations	23
A. Retentionist States	23
B. Abolitionist States	24
C. All States	24
D. International organizations	24
E. Non-governmental organizations	25

I. Introduction

1. The present report provides an overview of the activities carried out by the Special Rapporteur since the submission of his report to the General Assembly at its sixty-sixth session (A/66/330). In section III, he focuses on specific issues of concern and areas for international engagement regarding the imposition of the death penalty.

II. Activities of the Special Rapporteur

2. The activities carried out by the Special Rapporteur from 1 January 2011 to 15 March 2012 are outlined in his report to the Human Rights Council at its twentieth session (A/HRC/20/22). In the thematic section of that report, the Special Rapporteur focused on the protection of the right to life of journalists.

A. International and national meetings

3. On 6 June 2012, the Special Rapporteur gave an address at an event about his mandate, organized by the American Society of International Law in Washington, D.C.

4. On 7 June, he spoke at a conference on protecting the right to freedom of expression, organized by the Academy on Human Rights and Humanitarian Law of American University in Washington, D.C.

5. From 13 to 15 June, he attended the nineteenth annual meeting of special rapporteurs, representatives, independent experts and chairpersons of working groups of the Human Rights Council, held in Geneva.

6. During the twentieth session of the Human Rights Council, held from 18 June to 6 July, the Special Rapporteur participated in several side events. He was a panellist during the side event on the theme "Protection of journalists: United Nations and regional approaches for better protection", organized by the Permanent Mission of Austria to the United Nations Office and other international organizations in Geneva, on 20 June. On 21 June, he took part in a side event on States' responsibilities in the promotion and protection of human rights in the context of peaceful protests, organized by the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva. He gave addresses at two additional events: one on the human rights implications of targeted killings, organized jointly by the American Civil Liberties Union, the Center for Constitutional Rights, the International Commission of Jurists and the International Federation for Human Rights, and the other on extrajudicial executions in Colombia, organized by the Colombian Commission of Jurists and the International Federation for Human Rights.

7. On 25 and 26 June, the Special Rapporteur organized an expert consultation on the death penalty to inform the present report, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, held at Harvard Law School, United States of America. He expresses thanks to all the participants for their assistance in the preparation of the present report, in particular Tess Borden.

8. On 3 July, he participated in a global panel on the theme "Moving away from the death penalty — lessons learned from national experience", organized by the Office of the United Nations High Commissioner for Human Rights, in New York.

B. Visits

9. During the period under review, the Special Rapporteur visited India from 19 to 30 March 2012, at the invitation of the Government. His report on that mission will be submitted to the Human Rights Council in 2013.

10. Since his previous report to the General Assembly, the Special Rapporteur has sent visit requests to Libya, Pakistan, the Syrian Arab Republic and Turkey. He has also reiterated his interest in carrying out a visit to Sri Lanka. The Special Rapporteur thanks the Governments of Mexico and Turkey for having responded positively to his requests. He further encourages the Governments of Thailand and Uganda to accept his previous requests to visit.

III. Restrictions on the death penalty

A. Introduction

11. The right to life is the precondition for the full realization of human dignity and the effective exercise of all human rights. The prohibition on arbitrary deprivation of life is part of customary international law and was recognized by the Human Rights Committee in its general comment No. 24 as a peremptory norm or *jus cogens*, signalling that it cannot be overridden by other norms (CCPR/C/21/Rev.1/Add.6, para. 10). Article 3 of the Universal Declaration of Human Rights states that everyone has the right to life, liberty and security of person, while article 6 (1) of the International Covenant on Civil and Political Rights provides that every human being has the inherent right to life, which is to be protected by law, and that no one is to be arbitrarily deprived of his life.

12. Life is the supreme right and the ultimate metaright, since no other right can be enjoyed without it. The protection of the right to life is not merely a matter of domestic concern; the equal protection of all lives is central to the international human rights system.

13. For States in which the death penalty continues to be used, international law imposes stringent requirements that must be met for judicial killing not to be regarded as an arbitrary deprivation of life and therefore unlawful. These requirements were elaborated by the Economic and Social Council in its resolution 1984/50 on safeguards guaranteeing protection of the rights of those facing the death penalty.

14. The requirement of non-arbitrariness in the context of the death penalty has a procedural component, centred on the requirements of legality and fair trial. It also has a substantive component that entails, among other requirements, imposition only for the most serious crimes, minimum standards of protection for vulnerable groups, and equality and consistency.

15. In its resolution 17/5, the Human Rights Council requested the Special Rapporteur to continue to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto.

16. In the present report, the Special Rapporteur focuses on selected issues of concern regarding the current use and status of the death penalty worldwide. He considers, at the procedural level, the problem of error and of military tribunals, which are concerns in respect of fair trial guarantees. He then turns to substantive issues and deals with the requirements that the death penalty be imposed only for the most serious crimes and not involve mandatory sentencing. This is followed by consideration of two broader issues: collaboration and complicity of States and other entities in the imposition of the death penalty; and the requirement of transparency.

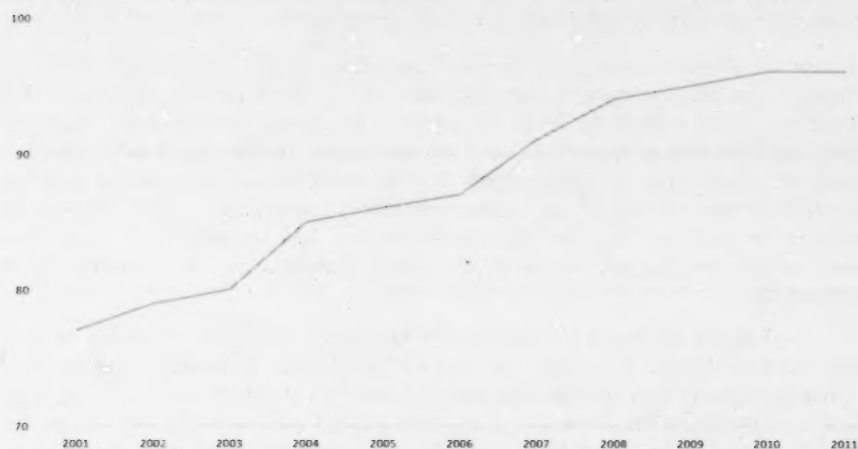
17. Most States no longer provide for the imposition of the death penalty in their legal systems. Of the 193 States Members of the United Nations, 94 do not have capital punishment in their legal systems. A further 49 States are considered to be de facto abolitionist in the sense that they have carried out no executions during the past 10 years. In total, therefore, only 50 States are considered to be retentionist, while 143 are abolitionist either in law or practice. In January 2012, Latvia became abolitionist for all crimes. During 2011, the number of countries that performed executions fell to 21. In many States whose laws allow for the death penalty, it plays only a symbolic role.

18. In the United States, five states recently abolished the death penalty, bringing the total number of abolitionist states to 17, of a total of 50. A referendum on abolition is pending in California.

19. In a number of countries, the crimes for which people may be executed have been restricted. Similarly, there is a trend away from mandatory death sentence regimes.

20. The legal space and public opinion surrounding the death penalty in all but a handful of countries have moved over the decades towards greater restrictions on the death penalty, including to the point of abolition (see figure 1).

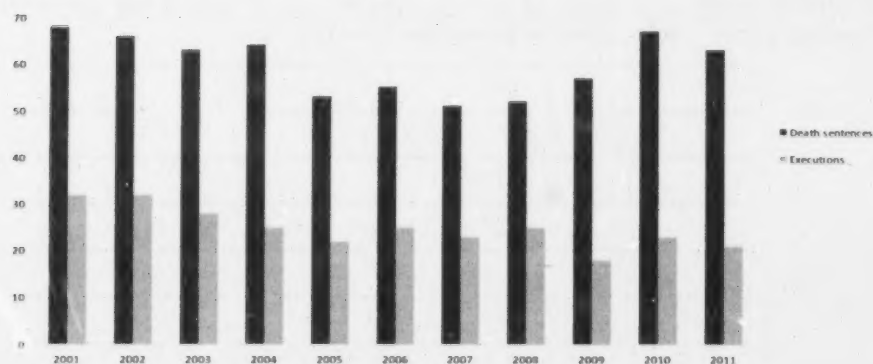
Figure I
Number of countries abolitionist for all crimes (2001-2011)



Source: Data derived from Amnesty International, *Death Sentences and Executions in 2011* (London, 2012).

21. For those countries that retain the death penalty in law, it is important to note the difference between figures for death sentences judicially imposed compared to actual executions (see figure II).

Figure II
Number of countries imposing death sentences and carrying out executions (2001-2011)



Source: Data derived from Amnesty International, *Death Sentences and Executions in 2011* (London, 2012).

22. The General Assembly, the Council of Europe, the Organization for Security and Cooperation in Europe, the African Commission on Human and Peoples' Rights and, in August 2012, the Inter-American Commission on Human Rights have called for moratoriums on the use of the death penalty.

23. Those calls notwithstanding, the death penalty remains a reality. In many cases, domestic law and practice run counter to international standards, while in others the information needed to make this assessment is kept secret.

24. Some current issues in respect of the death penalty are addressed below.

B. Fair trial guarantees

25. It is arbitrary to impose the death penalty where the proceedings do not adhere to the highest standards of fair trial. Pursuant to article 6 (2) of the International Covenant on Civil and Political Rights and general comment No. 6 of the Human Rights Committee, the death penalty may be imposed only in accordance with law not contrary to the provisions of the Covenant and pursuant to a final judgement rendered by a competent court. Furthermore, proceedings must include all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the Covenant. According to the Committee in *Reid v. Jamaica*, a violation of article 14 standards in a case where a sentence of death is imposed also constitutes a violation of article 6 (see CCPR/C/51/D/355/1989).

26. The standards of fair trial are well established and documented under international law and will not be repeated here. Rather, two issues that highlight the importance of fair trial guarantees in this context will be examined.

1. Problem of error

27. Increasingly, evidence is emerging that innocent people are sentenced and even put to death. When such evidence results in exonerations, these developments should be heralded. Such failures of justice, however, point to the reality that the levels of stringency with which fair trial standards are applied are often inadequate to protect the innocent.

28. A compelling example can be seen in the United States, where sophisticated methods of evidence-gathering, such as DNA analysis, are available. Since 1973, 140 people have been exonerated from death row in 26 states.¹ From 1973 to 1999, there were on average 3.03 exonerations for capital crimes each year. With the advent of more advanced technology, on average five people sentenced to death have been exonerated each year since 2000.² Since the first exoneration through DNA testing in 1993, 17 people in the United States have been exonerated by this technology specifically.²

29. While the availability of technology in the United States may enable exonerations in some cases before it is too late, very few countries that resort to the death penalty on a large scale have access to such resources. This raises the question

¹ See www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

² See www.deathpenaltyinfo.org/innocence-and-death-penalty.

of how many innocent people around the world have been executed or may currently be among the estimated 18,750 people on death row.³

2. Military jurisdictions

30. From the perspective of fair trial standards, the imposition of the death penalty, especially on civilians, by military courts and tribunals represents a worrying trend. In paragraph 22 of its general comment No. 32, the Human Rights Committee noted that the trial of civilians in military courts might raise serious problems as far as the equitable, impartial and independent administration of justice was concerned. Principle 5 of the Basic Principles on the Independence of the Judiciary provides that everyone is to have the right to be tried by ordinary courts using established legal procedures. The Working Group on Arbitrary Detention has concluded that military justice systems should be prohibited from imposing the death penalty under all circumstances (E/CN.4/1999/63, para. 80).

31. In many instances, military jurisdictions circumvent basic fair trial guarantees, including by not allowing individuals adequate preparation of their defence. In paragraph 6 of its general comment No. 32 (CCPR/C/GC/32), the Human Rights Committee reaffirmed that the guarantees enshrined in article 14 of the International Covenant on Civil and Political Rights were applicable to common and exceptional jurisdictions of a civil and military character and that:

The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.

32. In recent years, the actual or potential use of the death penalty by such tribunals has been reported to be problematic in Bahrain, the Democratic Republic of the Congo, Egypt, Lebanon, the Occupied Palestinian Territory, Somalia and the United States.

33. Military or other special jurisdictions are ill suited to ensuring full compliance with fair trial standards as required in capital cases (E/CN.4/1996/40, para. 107). They should not have the power to impose sentences of death on anyone.

C. Most serious crimes

1. Background

34. A key determinant of the scope of the legitimate use of the death penalty is the range of crimes for which it may be imposed. Pursuant to article 6 (2) of the International Covenant on Civil and Political Rights, in countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes.

35. The scope of article 6 (2) has been articulated restrictively. The first of the safeguards guaranteeing protection of the rights of those facing the death penalty

³ Amnesty International, *Death Sentences and Executions in 2011* (London, 2012).

(see para. 13) provides that capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The Human Rights Committee has found the imposition of the death penalty for crimes that do not result in loss of life incompatible with the Covenant (CCPR/C/79/Add.25, para. 8). As clarified by a previous mandate holder, these conclusions have been reflected in the current international legal interpretation of the term “most serious crimes” as limited to crimes involving lethal intent and resulting in death — in other words, intentional killing (A/HRC/4/20, paras. 54-62 and 66).

36. The Commission on Human Rights and the Human Rights Committee have determined that the following offences do not meet the “most serious crimes” threshold: abduction not resulting in death (CCPR/CO/72/GTM, para. 17), abetting suicide (A/50/40, para. 449), adultery (CCPR/C/79/Add.25, para. 8), apostasy (CCPR/C/79/Add.85, para. 8), corruption (CCPR/C/79/Add.25, para. 8), economic crimes (CCPR/C/79/Add.1, para. 5; CCPR/C/79/Add.25, para. 8), the expression of conscience (resolution 2005/59 of the Commission on Human Rights, para. 7 (f)), financial crimes (ibid.), embezzlement by officials (CCPR/C/79/Add.85, para. 8), evasion of military service (CCPR/C/79/Add.84, para. 11), homosexual acts (CCPR/C/79/Add.85, para. 8), illicit sex (ibid.), sexual relations between consenting adults (resolution 2005/59 of the Commission on Human Rights, para. 7 (f)), theft or robbery by force (CCPR/C/79/Add.85, para. 8; CCPR/CO/83/KEN, para. 13), religious practice (resolution 2005/59 of the Commission on Human Rights, para. 7 (f)) and political offences (CCPR/C/79/Add.101, para. 8). The Committee has also found that drug-related offences do not qualify (A/50/40, para. 449; A/55/40, para. 464).

37. According to an August 2012 review of statistics assembled for the current report by Death Penalty Worldwide,⁴ based on the available information, all retentionist States and all but two de facto abolitionist States have legislation that provides for the death penalty for crimes not resulting in death. A total of 38 of 44 retentionist States and 33 of 49 de facto abolitionist States have legislation prescribing the death penalty for crimes resulting in death but where there was no intent to kill. This apparent discrepancy necessitates a closer consideration of the basis for the international standard that only intentional killing fits the definition of “most serious crimes”.

2. Interpretation

(a) International nature of the norm

38. As part of an international treaty, the term “most serious crimes” should be understood as an international standard applicable to all States. States cannot claim compliance with article 6 (2) merely because the crime is seen as serious in their specific context. This consideration rules out such moral crimes as apostasy and homosexual conduct. In most countries these are not crimes at all, let alone viewed as “most serious crimes”. Inasmuch as an international standard is meant to reflect international consensus, it is noteworthy that several States are questioning the appropriateness of using the criminal law model for drug control.

⁴ Death Penalty Worldwide, paper presented at an expert consultation to inform the preparation of the present report, Cambridge, United States, 25 and 26 June 2012.

(b) Article 6 (2) as an exception

39. It is clear from the structure of article 6 that article 6 (2) constitutes an exception to the provisions of article 6 (1). Article 6 (1) protects the right to life in general terms, while article 6 (2) provides limited circumstances in which States may deviate from those terms. The understanding of article 6 (2) as an exception is supported by the inclusion of article 6 (6), which states that nothing in the article is to be invoked to delay or prevent the abolition of capital punishment by any State party to the Covenant.⁵

40. The history of the provision demonstrates that article 6 (2) was contemplated as an exception. The term "most serious crimes" is, according to one death penalty scholar, "a product of its time" and "a 'marker' for the policy of moving towards abolition through restriction". At the time of adoption of the Covenant, States expected the category of permissible capital offences to narrow over the years, meaning that they could not enumerate those offences without limiting any future development.⁶

41. In 1971, the General Assembly adopted resolution 2857 (XXVI), in which it reinforced the idea of narrowing over time by calling for the progressive restriction of the number of offences for which the death penalty might be imposed.

42. The objective of progressive restriction must inform contemporary interpretations of what is permissible under article 6 (2).⁶ Such evaluation must take into account both State practice and the evolution of the human rights system itself, wherein norms that offer further protection and conceptualization of the constituent rights have developed over the years. Capital crimes introduced after the entry into force of the Covenant, such as capital drug offences, should consequently be viewed with particular circumspection.

43. It is a matter of concern that a few States continue with a policy of broadening offences punishable by death. For example, in 2011, a new penal law for terrorism crimes and financing of terrorism was presented for consideration in Saudi Arabia, containing 27 offences punishable by death. In Bangladesh, a bill to amend the Anti-Terrorism Act of 2009 was adopted by the parliament in February 2012, introducing the death penalty for financing of terrorism and other offences.

44. There have also been welcome recent developments that reduce the scope of offences punishable by death. In February 2011, a law was adopted in China to remove the death penalty for 13 non-violent crimes, of 68 crimes punishable by death, and banned capital punishment for offenders over the age of 75. In June 2012, the Emir of Kuwait refused to sign a bill passed by the parliament providing for the death penalty for specific religious offences.

(c) Role of State practice

45. Given the room for progressive restriction built into article 6 (2), State practice must be considered in order to understand the current permissible scope of the "most serious crimes" provision. This approach is grounded in the normative

⁵ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge, United Kingdom, Cambridge University Press, 2002), p. 68.

⁶ Roger Hood, "The enigma of the 'most serious' offences", Center for Human Rights and Global Justice Working Paper, No. 9 (New York, NYU School of Law, 2006), p. 3.

framework of customary international law and in general principles of treaty interpretation (see article 31 (3) (b) of the Vienna Convention on the Law of Treaties).

46. State practice in the context of the most serious crimes should be established not only by considering legislative provisions, but also by looking at the crimes for which executions are currently carried out in practice. That States describe a particular crime as a capital offence in their statute books, but in practice have it there largely for symbolic reasons and do not execute anyone for it, spoils rather than supports an argument that it is acceptable to execute for that crime.

47. State practice in respect of intentional killing suggests that retentionist States regard it as falling within the category of "most serious crimes": all States that continue to carry out executions find it acceptable to do so for intentional killing. As measured by State practice, however, there is no consensus among States to support the death penalty for crimes that do not involve lethal intent and that do not result in death, such as drug-related offences or economic crimes. In reality, many of these death-eligible crimes are not prosecuted by retentionist States as capital offences and/or death sentences are not handed down for them. Even fewer States actually carry out executions for these offences.

48. According to the above-mentioned study by Death Penalty Worldwide, there are confirmed executions from 2008 to date for crimes other than intentional killing in only 16 of 44 retentionist States. Of the 21 most active retentionist States (those that carried out executions in 2011), there are confirmed executions for crimes other than intentional killing in only 12 since 2008.

49. Insofar as a consensus can be established, it is significant that most retentionist States, probably 28 of 44, appear to carry out executions only for crimes involving lethal intent and resulting in death. This consensus is further extended by the 49 de facto abolitionist countries that clearly do not carry out executions for other crimes. Consequently, 77 of 93 States that are permitted to carry out executions under their national law do not in fact do so for crimes that do not constitute intentional killing.

50. To the extent that available figures allow broad outlines to be drawn, it appears that, in practice, States may be aligning with the international legal interpretation of the term "most serious crimes" as contemplating only intentional killing.

(d) Drug-related offences

51. Currently, 32 States have laws providing for the death penalty for drug-related offences. This total has been decreasing over the past decade.⁷ As suggested earlier, few States impose death sentences for these crimes and even fewer actually carry out executions for them. Nevertheless, it is alarming that the States that do resort to the death penalty for these offences sometimes do so with high frequency. A small group of States is responsible for the vast majority of death sentences and executions for drug-related offences worldwide: China, the Islamic Republic of Iran, Saudi Arabia and Viet Nam, followed by, to a lesser extent, Malaysia and Singapore. Some States reportedly carry out more executions for drug-related offences than for

⁷ International Harm Reduction Association, *The Death Penalty for Drug Offences: Global Overview 2011* (London, 2011).

any other type of offence. For example, executions for drug-related offences in the Islamic Republic of Iran reportedly increased sixfold from 2008 to 2010 and currently comprise between 85 and 90 per cent of the State's total executions.⁷

52. The number of executions for drug-related offences in China is a State secret but is believed to be high.⁸ Viet Nam likewise claims execution numbers as secret, but it is reported that most death sentences from 2007 to 2010 were imposed for drug-related offences.⁷ In Malaysia, actual execution numbers are not publicly available. In 2011, however, it was reported that 479 of 696 prisoners on death row had been sentenced to death for drug-related crimes.⁷

53. In addition to these six high-application States, seven low-application States have resorted to death sentences and sometimes executions for drug-related offences in a number of cases in the past five years: Egypt, Indonesia, Kuwait, Pakistan, the Syrian Arab Republic, Thailand and Yemen.⁷

54. While the above 13 States impose death sentences and, in some cases, carry out executions, 14 others have legislation prescribing the death penalty for drug-related offences but have never or have not for many years resorted to it. Lastly, while the Democratic People's Republic of Korea, Iraq, Libya and the Sudan retain the death penalty in law for drug-related offences, insufficient data are available regarding actual use to place them among these other groups of States.⁷

55. Insofar as figures for actual executions can be established, only between 8 and 15 States appear to put drug offenders to death. Since 2007, known executions have taken place in China, Indonesia, the Islamic Republic of Iran, Kuwait, Pakistan, Saudi Arabia, Singapore and Thailand. It is probable that executions for drug-related offences have also taken place in the Democratic People's Republic of Korea, Malaysia and Viet Nam. It is unknown, but possible, that executions for drug-related offences have occurred in Egypt, Iraq, the Syrian Arab Republic and Yemen.

56. These statistics support a conclusion similar to that reached for "most serious crimes" more generally. Only a minority of States Members of the United Nations (32 worldwide) retains the death penalty for drug-related offences in law, of which only between 8 and 15 actually carry out executions for them. These numbers indicate a broad consensus that States that maintain the death penalty as part of their law should not carry out executions for drug-related offences.

57. The special rapporteurs on health and torture have confirmed the view of the current mandate holder and the Human Rights Committee that the weight of opinion indicates that drug offences do not meet the threshold of "most serious crimes" to which the death penalty might lawfully be applied (E/2010/10, para. 67).

58. The nature of drug-related offences is conceptually unique and makes this category particularly vulnerable to arbitrary practices. Unlike murder, for example, drug crimes effectively criminalize action not for the grave consequences that it has had but for those believed to be likely. The causal connection is thus many stages removed and often even pre-empted by the drug-related arrest.

59. In domestic legislation, the range of related activities contemplated in this category is typically overexpansive and involves very different degrees of connection to drug trafficking. In some cases, it may also involve a presumption that

⁸ Ibid.; and Amnesty International, *Death Sentences*.

possession of a threshold quantity of drugs is proof of trafficking, which is a capital offence and which the defendant must then disprove. As early as 1995, the Secretary-General noted that the threshold for a capital drug offence among retentionist States varied from the possession of 2 to 25,000 grams of heroin (E/1995/78, para. 55). In some States, many or even most death sentences and executions are for dealers in less dangerous drugs, such as marijuana traffickers.⁷ Such discrepancies present additional concerns of arbitrariness.

60. There is no persuasive record that the death penalty contributes more than any other punishment to eradicating drug trafficking. In November 2011, the Secretary General of the Iranian High Council for Human Rights stated that:

More than 74 per cent of executions in Iran are stemming from drug trafficking related crimes. Whether it is correct or not, there is a big question: "Did this harsh punishment bring the crimes down or not?" In fact, [it] did not bring it down.⁹

(e) Mandatory sentences

61. Legislation that leaves courts with no choice but to impose death sentences for specific crimes violates various human rights standards. A mandatory death sentence, even where killing was intentional, necessarily fails to take into account mitigating circumstances that might otherwise show the specific crime to be less serious (A/HRC/4/20, para. 55). A further problem is that mandatory sentences are often prescribed for crimes that do not meet the "most serious" requirement.

62. A mandatory sentence also undermines the separation of powers between the legislative and judicial organs of the State, at least in the context of capital crimes. The legislature essentially takes the judiciary's decision as to the most appropriate sentence in all like cases.

63. The Human Rights Committee has found that mandatory death sentences violate the "most serious crimes" provision (CCPR/C/70/D/806/1998, para. 8.2). Regional systems, including the African Commission on Human and Peoples' Rights, have likewise concluded that a death sentence may not be imposed without consideration of the circumstances of the offences and characteristics of the offender.¹⁰

64. Although at least 29 States retain a mandatory death sentence for specific offences, there is growing State consensus that it is unlawful as an arbitrary deprivation of life: at least 18 States have rejected it since 2008. A number of domestic courts have found a mandatory death sentence to be arbitrary and/or inhumane and therefore unconstitutional. Some have held it in violation of the rights to life and fair trial, and the principle of separation of powers.¹¹

65. In addition, a handful of States, including Bangladesh, Guyana, India, Kenya, Malawi and Uganda, have recently turned against mandatory death sentences for specific crimes. The Deputy Prime Minister of Singapore has expressed opposition

⁹ Amnesty International, *Death Sentences*.

¹⁰ *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, para. 31, African Commission on Human and Peoples' Rights, 2004; *Boyce v. Barbados*, paras. 57-63, Inter-American Court of Human Rights, 20 November 2007.

¹¹ See www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm.

to its imposition for some minor drug-related crimes.¹² While the mandatory sentence should be eliminated for any and all potential capital offences, these developments are notably in the right direction.

(f) Conclusion

66. The notion of progressive restriction and the status of article 6 (2) as an exception suggest that States that wish to use the death penalty must provide a justification for this limitation on the right to life. The outlines of the global picture that can be discerned suggest that there is insufficient consensus to permit the inclusion of crimes other than intentional killing within the exception created for the "most serious crimes".

67. The first of the safeguards guaranteeing protection of the rights of those facing the death penalty should be understood to mean: "In countries which have not abolished the death penalty, capital punishment may be imposed only for intentional killing, but it may not be mandatory in such cases."¹³

D. Collaboration and complicity

68. The actual execution of a prisoner sentenced to death may depend on the collaboration of a web of actors beyond the executing State. Where the death penalty is imposed in violation of international standards, this assistance may amount to complicity and should lead to indirect legal or other responsibility on the part of the assisting party.

69. As a consequence of greater awareness of the risks of such complicity, State and other actors may decide not to collaborate in the pursuit of otherwise desirable common goals with States that maintain the death penalty. For example, one principal reason why the international criminal tribunals did not include death sentences in their statutes was to avoid jeopardizing the collaboration needed from abolitionist States and other actors.¹⁴ Rwanda also factored those considerations into its abolition of the death penalty in 2007 so that it could receive persons suspected of involvement in the 1994 genocide for national prosecutions.

70. Other States, intergovernmental organizations and non-State actors, such as private-sector corporations and medical personnel, have assisted States in using the death penalty.

1. Assistance by States

(a) Transfer of persons

71. One form of State assistance with regard to the death penalty occurs through the transfer of persons to the jurisdiction of the executing State, such as through extradition, deportation, surrender, handover or any other form of enforced removal.

¹² See <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=676>.

¹³ Roger Hood and Carolyn Hoyle, *The Death Penalty*, 4th ed. (Oxford, Oxford University Press, 2008), p. 132.

¹⁴ William A. Schabas, "Indirect abolition: capital punishment's role in extradition law and practice", *Loyola of Los Angeles International and Comparative Law Review*, vol. 25, No. 3 (2003).

72. International human rights law entails an obligation on States not to transfer people when State authorities know, or ought to know, that the individuals concerned would face a genuine risk of serious human rights violations, including arbitrary executions.¹⁵ The international law principle of non-refoulement prohibits such a transfer in these situations and holds States, irrespective of all other considerations, responsible for all and any foreseeable consequences suffered by them.¹⁶ This prohibition takes precedence over specific bilateral extradition treaties or other agreements, such as on mutual assistance in criminal matters, that may be in place (CCPR/C/48/D/470/1991, para. 13.1).

73. In the context of the death penalty, the application of the non-refoulement principle differs between abolitionist States and States that retain the death penalty in law.

74. States that have abolished the death penalty are absolutely prohibited from transferring a person when they know or ought to know that there is a real risk of the imposition of the death penalty (A/HRC/18/20, para. 45).

75. For States parties to the International Covenant on Civil and Political Rights in this category — that is, the majority — this prohibition applies irrespective of whether the requesting State complies with international standards in its use of the death penalty. It is also not dependent on whether the sending State has ratified the Second Optional Protocol, although it applies a fortiori to those that have ratified a treaty that specifically provides for the abolition of the death penalty.¹⁷ The question of the State's intent is also immaterial; it matters only that the risk is foreseeable (CCPR/C/78/D/829/1998, para. 10.6, and CCPR/C/21/Rev.1/Add.13, para. 12). Transfer in violation of this prohibition amounts to an indirect violation of article 6 (1) of the Covenant by the abolitionist State, even though the requesting State, if it complies with all international standards, may not itself act unlawfully.

76. This absolute prohibition stems from the fact that States, once they have abolished the death penalty, are foreclosed from reinstating it (see CCPR/C/70/D/869/1999) and that only retentionist States can claim the exceptions provided under article 6 (2) (CCPR/C/78/D/829/1998, paras. 10.2-10.6). Assisting a retentionist State in its imposition of the death penalty therefore raises problems of inconsistency with the abolitionist State's obligation to protect the right to life. The Human Rights Committee concluded in *Judge v. Canada* that an abolitionist State would violate article 6 (1) not only if it were to reinstate the death penalty, but also if it were to transfer a person to a country where he or she would risk imposition of the death penalty, stating that, "for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application" (ibid.,

¹⁵ See principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set out in the annex to Economic and Social Council resolution 1989/65, and the jurisprudence of the Human Rights Committee in *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.5, and *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.9.

¹⁶ See several decisions of the European Court of Human Rights in this regard: *Soering v. United Kingdom*, paras. 85 and 86, 7 July 1989; *Hirsi Jaama and Others v. Italy*, para. 115, 23 February 2012 (judgement of the Grand Chamber); and *Saadi v. Italy*, para. 126, 28 February 2008 (judgement of the Grand Chamber).

¹⁷ See the concurring opinion of Judge Cabral Barreto in *Bader and Others v. Sweden*, European Court on Human Rights, 8 November 2005.

para. 10.4). Regional and domestic courts have reached similar conclusions.¹⁸ In line with this approach, the Constitutional Court of South Africa affirmed in July 2012 that deporting individuals to a State in which they might face execution would violate the right to life of the persons concerned.¹⁹

77. For their part, States that retain the death penalty in law may transfer persons where there is a risk of the death penalty, but the transfer is lawful only where the requesting State adheres to all requirements imposed by international law, specifically but not exclusively those enshrined in articles 6 and 14 of the Covenant and in the safeguards guaranteeing protection of the rights of those facing the death penalty.²⁰

78. If adequate and reliable, diplomatic assurances may render a transfer lawful in the context of the death penalty (E/2010/10, para. 9). For transferring States that have abolished the death penalty, assurances must be obtained that remove completely the possibility that the person would face the death penalty in the receiving State. Retentionist States must obtain assurances that the receiving State will impose the death penalty only in compliance with international law. In all cases, to render the transfer lawful, the assurances must comply with various standards, including making public the existence and terms of the assurance in line with the principle of transparency.

(b) Mutual assistance: provision of information and logistical support

79. States often assist one another in criminal and other matters by means other than the transfer of persons. Such assistance may include the provision of intelligence information, incriminating evidence or police assistance and investigation aid sufficient to capture the suspect; lethal drugs or materials for the execution; funds for projects such as drug control; and other forms of financial and technical support, for example to strengthen the legal system. These forms of inter-State cooperation may also raise questions of complicity where they contribute to the imposition of the death penalty in violation of international standards or issues of non-compliance with the assisting State's international legal commitments.

80. Human rights advocates have raised concerns that such assistance may facilitate capital sentences and/or executions²¹ and identified specific cases in which such assistance appears to have directly or indirectly led to the capture of suspects later sentenced to death.²²

81. The same legal principles apply here as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition.¹⁴

¹⁸ See *Soering v. United Kingdom*, European Court of Human Rights, paras. 85 and 86.

¹⁹ See *Minister of Home Affairs and Others v. Tsebe and Others, Minister of Justice and Constitutional Development and Another v. Tsebe and Others*, para. 73, Constitutional Court of South Africa, 27 July 2012.

²⁰ See the dissenting opinion by Human Rights Committee members Eckart Klein and David Kretzmer in *G.T. v. Australia* (CCPR/C/61/D/706/1996, appendix).

²¹ See Amnesty International, *Addicted to Death: Executions for Drug Offences in Iran* (London, 2011).

²² See International Harm Reduction Association, *Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights* (London, 2012).

82. Practices that show sensitivity to this issue include the elaboration in 2010 by the United States Department of Commerce of regulations to control the export of equipment designed for the execution of human beings, in addition to the decision of the European Union in December 2011 to block the export to the United States of specific drugs that could be used for lethal injections (Commission Implementing Regulation (EU) No. 1352/2011 of 20 December 2011 amending Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment).

83. That some States retain the death penalty for drug-related offences, in contravention of the "most serious crimes" requirement, raises the issue of balancing mutual assistance with non-violation of human rights standards. Concerns have been voiced, including from within the international drug control system, that such human rights abuses may undermine the integrity of the system.

84. Clear guidelines are needed to help States to engage in cooperative drug control efforts without departing from the human rights framework, including international standards on the death penalty. These guidelines should also assist in making operational the standards on State responsibility in this context.

85. Such guidelines are being explicitly sought by regional organizations that are major donors with regard to drug control efforts. For example, in a December 2010 resolution on the European Union's annual report on human rights and democracy in the world, the European Parliament called upon the European Commission to develop guidelines governing international funding for country-level and regional drug enforcement activities. Some individual States, such as Australia and the United Kingdom of Great Britain and Northern Ireland, are already developing domestic safeguards and guidance.

86. These examples demonstrate the need for a coordinated approach. They also represent positive progress in bringing external action into line with international standards, specifically those surrounding the death penalty and international legal responsibility (see article 16 of the draft articles on responsibility of States for internationally wrongful acts, prepared by the International Law Commission).

2. Intergovernmental level

87. The intergovernmental level involves many of the same considerations. With regard to the transfer of persons, the United Nations — bound by the principle of non-refoulement as a matter of customary law — and contributing States in multinational operations commonly follow the practice not to transfer persons if there is a risk of the death penalty.²³ Furthermore, the United Nations and other international organizations often assist in the crime prevention programmes of specific States and may likewise be implicated by involvement in unlawful executions.

88. Drug-related offences present one of the principal issues in terms of assistance concerns. The United Nations agenda includes action to curb drug use and other activities related to illicit drugs, in addition to the pursuit of human rights. When it comes to implementing coordinated programmes, in practice these objectives are potentially in tension. Indeed, the increase in the number of countries that provide

²³ Cordula Droege, "Transfer of detainees: legal framework, non-refoulement and contemporary challenges", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), pp. 669, 686 and 688.

for the death penalty for drug-related offences coincided with the adoption of international drug control treaties by many States.²⁴ As one commentator reflected, "those sentenced to death become a statistic in drug enforcement 'successes', while passing simultaneously into human rights statistics documenting ongoing abuse".²²

89. While mixed messages were previously sent, the international drug control system now fully recognizes the need to ensure that drug control is pursued in a manner consistent with international human rights law, explicitly stating that the death penalty for drug-related crimes violates recognized norms. This has been made clear by the United Nations Office on Drugs and Crime (UNODC) on multiple occasions, including in 2010, when it called upon member States to follow international standards concerning prohibition of the death penalty for offences of a drug-related or purely economic nature (see E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1).

90. In 2012, UNODC introduced guidance in which it stated that in cooperative counter-narcotics projects it would seek assurances that international safeguards would be respected: "If, following requests for guarantees and high-level political intervention, executions for drug-related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support."²⁵

91. In its 2003 report, the International Narcotics Control Board referred to efforts by the United Nations to limit the scope of the death penalty to the most serious crimes (E/INCB/2003/1, para. 213). A number of scholars have, however, since criticized the Board for failing to clarify the balance of international responsibilities between drug control and human rights in the context of the death penalty.²⁶

92. While the elaboration of guidelines points in the right direction, actual practice has not been sufficiently modified accordingly and remains a matter of concern. For example, UNODC and some States are actively involved in the Islamic Republic of Iran, where more than 1,400 people have reportedly been executed since the beginning of 2010, most of them on drug-related charges.

3. Non-State actors

93. While States are the primary duty bearers under international human rights law, there is an increasing awareness of the impact of non-State actors on human rights. In the context of the death penalty, they are part of the web that in some cases makes unlawful executions possible.

(a) Corporations

94. Corporations assist in the imposition of the death penalty by providing equipment and materials that States use to carry out executions. Where such executions are unlawful, this assistance raises questions of legal or other responsibility. International standards for the conduct of business and human rights have been established and are developing further. These include the Guiding Principles on Business and Human Rights, the Global Compact and the Guidelines

²⁴ Amnesty International, "The death penalty: no solution to illicit drugs", October 1995. Available from www.amnesty.org/en/library/info/ACT51/002/1995/en.

²⁵ Available from www.unodc.org/documents/justice-and-prison-reform/HR_paper_UNODC.pdf.

²⁶ See www.hrw.org/news/2012/03/12/letter-international-narcotics-control-board-capital-punishment-drug-offences.

for Multinational Enterprises. Domestically, the law of the State of incorporation may establish corporate or individual (civil or criminal) liability for complicity, including extraterritorially, and harm to reputation has come to play a significant role in influencing corporate behaviour.

(b) Medical personnel

95. Around the world, medical associations have had to question to what extent their members, whose professional ethics require them to be healers and not executioners, may be involved in the implementation of the death penalty. This issue arises most regularly, but not exclusively, in the case of lethal injections, where medical personnel are often required by States to participate in the administration of lethal drugs and monitoring of the onset of death.

96. In a recent global study, it was said that: "Virtually all codes of professional ethics which consider the death penalty oppose medical or nursing participation. Despite this, many death penalty States have regulations specifying that health professionals be present at executions."²⁷

97. It is clearly established under international law and codes of medical ethics that physicians and other medical personnel should not participate in torture or other cruel, inhuman or degrading treatment or punishment.²⁸ From the perspective of ethics, if medical personnel should not help to torture, there is good reason to imagine that they should not help to execute, at least not where such executions may violate international law. States should be cognizant of these considerations when they call for the presence or assistance of medical personnel when administering the death penalty.

E. Transparency

98. Transparency, or the public availability of information, is an underappreciated, yet crucial, aspect of ensuring compliance of the use of the death penalty with the protection of the right to life under international law. The requirements of transparency are likely to become increasingly significant as the world becomes more interconnected and international human rights law, in general, and scrutiny of the supreme right that is the right to life, in particular, develop further. The coherence and integrity of the international supervisory system is challenged when there are black holes in respect of which no information is available on the taking of lives, whether through judicial or extrajudicial killings.

99. The United Nations has over many years emphasized the importance of the public availability of information on the death penalty. Recently, the Secretary-General stated that the obligations of those States that continued to use the death penalty included the obligation not to practise the death penalty in secrecy

²⁷ Amnesty International, "Execution by lethal injection", 4 October 2007. Available from www.amnesty.org/en/library/info/ACT50/007/2007.

²⁸ See, for example, General Assembly resolution 37/194, by which the Assembly adopted the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment; and the World Medical Association Council resolution on prohibition of physician participation in torture, adopted by the Council at its 182nd session, held in Tel Aviv, Israel, in May 2009.

(A/65/280, para. 72). This summarizes a long line of authoritative statements to the same effect within the United Nations system.

100. In 1989, the Economic and Social Council set out the minimum requirements of such transparency when, in paragraph 5 of its resolution 1989/64, it called upon all Member States:

To publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law.

101. In paragraph 5 (c) of its resolution 2005/59, on the question of the death penalty, the Commission on Human Rights echoed this appeal. In its resolutions 62/249, 63/168 and 65/206, adopted in 2007, 2008 and 2010, respectively, the General Assembly again called upon all States that maintained the death penalty to provide the Secretary-General with information relating to the use of capital punishment and to make that information publicly available so that it could contribute to possible informed and transparent national debates.

102. A previous mandate holder has reiterated the importance of transparency wherever the death penalty is applied, noting that secrecy as to those executed violates human rights standards and that full and accurate reporting of all executions should be published, and a consolidated version prepared on at least an annual basis (E/CN.4/2005/7, para. 87). The Human Rights Council has repeated such calls during the sessions of the Working Group on the Universal Periodic Review, as have other mechanisms.

103. Three dimensions of the need for transparency in the context of the death penalty can be distinguished. First, sufficient and relevant information must be provided to those individuals who are directly concerned: the person who is to be executed and his or her immediate relatives, in addition to the defence lawyers to ensure effective representation at all stages. Second, the general public in the State in question requires transparency for informed public debate and democratic accountability. Lastly, the international community as a whole has an interest in supervising the observance of the right to life everywhere.

104. Various legal bases have been put forward as the source of these obligations, often linked to the rights of or obligations due to these three groups. In respect of prisoners, their families and the public, the realization of specific rights imposes a duty of transparency on States: the right to life, considerations of fair trial and the right of the public to information. At the domestic level, the right to information informs the broader set of rights to political participation. The obligation to be transparent to the international community also stems on a general level from the nature of international human rights supervision, which is impossible without reliable information. In many cases, information on the death penalty cannot be obtained from any source other than the State itself.

105. The starting point for transparency in all cases in which the lawfulness of killings is in question is the State's duty to investigate violations of the right to life.

Since the right to life is recognized as a rule of customary international law, the obligation to uphold it extends to all States, irrespective of treaty ratification. The obligation to uphold this right has been recognized to include not only protection from violations but also investigation into violations. As a former mandate holder has pointed out, transparency and accountability are part and parcel of the right to life under both article 6 of the International Covenant on Civil and Political Rights and customary law.²⁹ A lack of accountability for a violation of the right to life is itself a violation of that right, and transparency is an integral part of accountability. The Human Rights Committee has further concluded that failing to be transparent about the fate of an individual, including by withholding information from families about imminent executions, could itself constitute a human rights violation (see CCPR/C/77/D/886/1999 and CCPR/C/77/D/887/1999).

106. While transparency obligations in respect of extrajudicial executions must rely on provisions guaranteeing the right to life and the duty of States to investigate violations, transparency in judicial executions is also required by provisions concerning fair trial standards and, in particular, the general rule that hearings should not take place behind closed doors. Article 14 of the International Covenant on Civil and Political Rights and various parallel regional treaty provisions dealing with fair trial standards explicitly recognize the right to a public hearing and provide that any judgement rendered in a criminal case or in a suit at law is to be made public. A violation of fair trial rights during capital cases, including the openness of the trial to the public, can also constitute a violation of the right to life itself (CCPR/C/86/D/915/2000, paras. 7.5-7.6, and CCPR/C/39/D/250/1987, paras. 11.5 and 12.2). Accordingly, a State that fails to be transparent in its death sentences in line with article 14 risks also violating article 6.

107. Article 14 contemplates not only the prisoner's rights but also the public interest in information. States have a duty to make information on the death penalty publicly available in the aggregate and not simply buried in files in courts throughout the country (E/CN.4/2006/53/Add.3, para. 12). As a previous mandate holder has noted, for every organ of government and every member of the public to have at least the opportunity to consider whether punishment is being imposed in a fair and non-discriminatory manner, the administration of justice must be transparent, and the kind of informed public debate about capital punishment that is contemplated by human rights law is undermined if Governments choose not to inform the public (*ibid.*). The provision on fair and public trials also enables the public to scrutinize the work of a country's courts. Keeping any part of the administration of justice secret, including the imposition and carrying out of death sentences, risks undermining public trust in judicial institutions and in the legal process as such.

108. Article 19 of the Covenant also generates transparency requirements in recognizing not only freedom of expression but also public access to information. In *Toktakunov v. Kyrgyzstan*, the Human Rights Committee found that information about a State's use of the death penalty was of public interest (CCPR/C/101/D/1470/2006). The Committee consequently recognized a general right to gain access to that information deriving from article 19.

²⁹ Philip Alston, "The CIA and Targeted Killings Beyond Borders", *Harvard National Security Journal*, vol. 2, No. 2 (2011), p. 314.

109. The idea of a public right to information finds further support in the emergence of a right to truth. In the context of the death penalty, this would create the public's right to the information needed to establish whether deprivation of life is arbitrary or lawful.

110. In contexts other than the death penalty where transparency issues are raised, States often claim that secrecy is necessary to protect national security. The link between information on executions and national security appears tenuous at best, however. In cases of extrajudicial executions, States often answer calls for information with the claim that they lack the required information, whether because non-State actors are involved or because they lack the capacity to provide disaggregated data. Irrespective of its validity in other contexts, this is not a valid argument in death penalty cases because these executions are by definition performed by the State itself and the information required is straightforward. It is difficult to imagine a persuasive rationale by which States might withhold this information other than as an attempt to avoid international scrutiny.

111. Official information on the use of the death penalty was not available for a number of States in 2011. Figures were classified as a State secret in Belarus, China, Mongolia and Viet Nam. Information on the practices of the Democratic People's Republic of Korea, Egypt, Eritrea, Libya and Malaysia is reportedly difficult to find. In 2011, in Belarus and Viet Nam neither prisoners nor their families and lawyers were informed of forthcoming executions; in 2010, the same held true for Botswana, Egypt and Japan.³⁰ These States have been called to account for these failures during, among others, sessions of the Working Group on the Universal Periodic Review (A/HRC/WG.6/4/MYS/1/Rev.1, para. 89; A/HRC/WG.6/5/VNM/3, para. 10; A/HRC/WG.6/8/BLR/3, para. 20; A/HRC/WG.6/9/MNG/3, para. 22; A/HRC/WG.6/9/MNG/2, para. 22; and A/HRC/WG.6/11/SGP/3, para. 18).

112. One result of secrecy is that the positive developments that are increasingly taking place may not be given the credit that is due if their details are not public. For example, although China is typically given as an example as a result of its troubling practices, during the past few years there have been indications that its total executions have decreased dramatically.³¹ Because these figures are State secrets, however, this assertion can neither be confirmed nor potentially commended.

113. Without reliable information, the international human rights system cannot function. In some cases, the international community has no advance knowledge of an imminent execution, rendering it ineffective in examining questions of lawfulness before execution. In others, the information is provided too late to take meaningful action. Over the years, mandate holders have had the disquieting experience of sending urgent appeals to Governments in great haste when they heard about an impending execution potentially in violation of international standards, only to learn a day or two later that the person had already been executed.

114. International practice over recent years has shown less tolerance for the unavailability of evidence in respect of alleged human rights violations. For example, the United Nations and regional treaty bodies increasingly accept allegations made in communications to be true when the State in question does not counter them. Likewise, where States do not submit State reports that are due, treaty

³⁰ Amnesty International, *Death Sentences and Executions in 2010* (London, 2011).

³¹ See <http://humanrightsdoctorate.blogspot.com/2011/12/china-and-death-penalty-signs-of.html>.

bodies no longer pass them over. Instead, they may consider the situation in the States in question even in the absence of such reports and issue concluding observations on the basis of information that is otherwise available.

115. The concern raised in section D above is also of importance in this context. Access to information about other States' death penalty practices is necessary for States to decide how they wish to engage in inter-State cooperation and foreign relations and to avoid running afoul of their own international legal commitments or being complicit in another State's violations of the right to life.

IV. Conclusions

116. International human rights law places stringent constraints on the conditions under which the right to life may be infringed, either extrajudicially or judicially. Exemplifying general international law, the International Covenant on Civil and Political Rights allows a narrowly defined exception by which life may be taken by the State and envisages its progressive restriction. As a general rule, State practice supports this trajectory of restriction.

117. Nevertheless, in a shrinking group of States people continue to be executed in contravention of the standards imposed by international law. The right to life remains the right on which all others depend and requires the highest level of protection.

V. Recommendations

A. Retentionist States

118. States should heed the calls made by the United Nations and regional human rights bodies to establish a moratorium on executions with a view to abolishing the death penalty.

119. The death penalty may not be used where the highest level of compliance with fair trial and other international standards are not met.

120. Where there is evidence that may point to innocence, this should be reviewable at any time, including after the conclusion of the legal process. Wherever possible, States should enable access to information or technology that may assist in such reviews and should provide technical assistance to one another.

121. Military or other special jurisdictions should not have the authority to impose the death penalty.

122. Domestic law should provide that death sentences may never be mandatory and may be imposed only for those crimes that involve intentional killing. The death penalty may not be imposed for drug-related offences unless they meet this requirement.

123. States should amend national laws on extradition and deportation to specifically prohibit the enforced transfer of persons to States where there is a genuine risk that the death penalty may be imposed in violation of internationally recognized standards, unless adequate assurances are obtained.

124. States should ensure transparency regarding individual cases of capital prosecution, death sentences and executions, including access to information by prisoners, their family members and the public, as well as regarding the overall use of the death penalty, by making aggregated statistics publicly available.

125. States should respond in a timely fashion to urgent appeals by special procedures mandate holders regarding imminent executions.

B. Abolitionist States

126. De jure abolitionist States, where they have not done so, should amend national laws on extradition and deportation to specifically prohibit the enforced transfer of persons to States where they face a genuine risk of the death penalty, unless adequate assurances are obtained.

127. De facto abolitionist States, where they have not done so, should establish official moratoriums on executions and confirm such abolition in law.

C. All States

128. States should develop guidelines on the provision of financial or technical aid and mutual assistance, especially with regard to drug-related offences, to ensure that they do not support violations of the right to life.

D. International organizations

129. In collaboration with States, international organizations should develop guidelines, in addition to processes or mechanisms to make them operational, on rendering assistance to States that continue to use the death penalty, especially in the context of drug-related offences.

130. The first of the safeguards elaborated by the Economic and Social Council in its resolution 1984/50 on safeguards guaranteeing protection of the rights of those facing the death penalty should be understood to mean: "In countries which have not abolished the death penalty, capital punishment may be imposed only for intentional killing, but it may not be mandatory in such cases".

131. International organizations should continue to work on the issue of business and human rights, including through the Working Group on the issue of human rights and transnational corporations and other business enterprises. Wherever possible, they should help corporations to undertake to in no way assist the unlawful imposition of the death penalty.

132. International human rights bodies should pay specific attention to the issue of transparency in respect of the death penalty in retentionist States, including in the context of universal periodic review.

133. The Secretary-General should conduct a survey of all retentionist States to determine to what extent they comply with and realize the obligations of transparency.

134. Regional human rights organizations should continue to pursue the issue of the abolition of the death penalty, in addition to complicity in unlawful practices. Emerging regional initiatives, such as the Association of Southeast Asian Nations, are encouraged to engage with the issue, including the matter of transparency.

E. Non-governmental organizations

135. Non-governmental organizations should remain seized of the matter of the death penalty and, in particular, should monitor scheduled executions and alert the international community in a timely fashion where there is reason to believe that an unlawful execution will take place. They should also monitor the issue of possible complicity by States and other actors in unlawful executions.



General Assembly

Distr.: General
9 August 2012

Original: English

Sixty-seventh session

Item 69 of the provisional agenda*

Right of peoples to self-determination

Right of peoples to self-determination

Report of the Secretary-General

Summary

In its resolution 66/145, the General Assembly requested the Secretary-General to report to the Assembly at its sixty seventh session on the universal realization of the right of peoples to self-determination. The present report is submitted in accordance with that request.

The report outlines the relevant jurisprudence of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights on the treaty-based human rights norms relating to the realization of the right of peoples to self-determination, and provides a summary of the developments relating to the consideration by the Human Rights Council of the subject matter, including by its special procedures.

* A/67/150.



I. Introduction

1. The General Assembly, in its resolution 66/145, adopted on 19 December 2011, reaffirmed the importance of the universal realization of the right of peoples to self-determination for the effective guarantee and observance of human rights. The Assembly welcomed the progressive exercise of the right to self-determination by peoples under colonial, foreign or alien occupation and their emergence into sovereign statehood and independence.

2. The present report is submitted in accordance with paragraph 5 of resolution 66/145, in which the Assembly requested the Human Rights Council to continue to give special attention to the violation of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation, and with paragraph 6, in which the Assembly requested the Secretary-General to report on this question at its sixty seventh session.

3. The report provides a summary of the main developments relating to the realization of the right to self-determination within the framework of the activities of the United Nations human rights mechanisms during the period under review. This includes recent concluding observations of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights based on their consideration of the periodic reports submitted by the States parties to the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, in respect of the implementation of the right to self-determination guaranteed in article 1 of the two Covenants. It also incorporates the consideration of the question by the Human Rights Council, including observations made in reports submitted to the Council by the Special Rapporteur on the Rights of Indigenous Peoples and the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

II. Human Rights Committee and Committee on Economic, Social and Cultural Rights

4. Article 1, paragraph 1, of the International Covenant on Civil and Political Rights, and article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights affirm the right of all peoples to self-determination. Article 1, paragraph 2, of the two Covenants affirms a particular aspect of the economic content of this right, namely the right of peoples, for their own ends, to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". Article 1, paragraph 3, of the International Covenant on Civil and Political Rights and article 1, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights impose upon States parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the Charter of the United Nations, in particular with article 1, paragraph 2.

5. The right to self-determination has been addressed by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in their

consideration of States parties' periodic reports submitted respectively under article 40 of the International Covenant on Civil and Political Rights and articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights. The relevant concluding observations adopted during the period under review are summarized below.

A. Concluding observations by the Human Rights Committee

6. During the reporting period, the Human Rights Committee addressed several issues related to the right to self-determination in Ethiopia and Guatemala.

7. In its concluding observations on Ethiopia, adopted on 25 July 2011, the Committee noted the recognition of the rights of ethnic and linguistic communities to self-determination at the level of the regional State according to the "ethnic federalism" established by the Constitution (see CCPR/E/ETH/1, paras. 4-14). However, the Committee was concerned about the lack of recognition and participation in public life of the ethnic and linguistic minorities living outside their designated "ethnic regions". The Human Rights Committee recommended that the State party recognize the existence of the various ethnic and linguistic minorities in each regional State and ensure their adequate political representation and participation at regional State and federal levels (see CCPR/C/ETH/CO/1, para. 26).

8. In its concluding observations on Guatemala, adopted on 28 March 2012, the Committee recognized the measures taken by the State party, such as the 2009-2012 Programme for the Development of Indigenous Peoples and the constitutional reforms of 2001, which are designed to ensure respect for indigenous rights, but regretted that indigenous peoples are not effectively consulted by the State party during decision-making processes that affect their rights. The Committee called on Guatemala to comply with its international commitment to carry out prior and informed consultations with indigenous peoples for all decisions relating to projects that affect their rights, in accordance with article 27 of the Covenant. The Committee also stated that the State party should recognize and take due account of all decisions taken by indigenous peoples during such consultations (see CCPR/C/GTM/CO3, para. 27).

B. Concluding observations by the Committee on Economic, Social and Cultural Rights

9. The Committee on Economic, Social and Cultural Rights addressed relevant aspects of the right to self-determination in its concluding observations on Argentina, New Zealand and Peru with respect to the rights of indigenous peoples.

10. In its concluding observations on Argentina, adopted on 2 December 2011, the Committee noted with concern that Act No. 26160 (extended by Act No. 26554), regarding the possession and ownership of lands traditionally occupied by indigenous peoples, has not been fully implemented. It also expressed concern about delays in providing indigenous communities with ownership titles to such lands or territories. In this connection, the Committee urged the State party to ensure the full and coordinated implementation of Act No. 26160/26554 both at the federal and provincial levels. The Committee recommended that the State party finalize the

process of demarcation in all provinces, as foreseen by the Constitution and existing laws, and that it expedite the granting of communal title of land to indigenous communities (see E/C.12/ARG/CO/3, para. 8).

11. The Committee also expressed concern about the persisting threats, displacements and violent evictions of indigenous peoples from their traditional lands in numerous provinces. It also regretted the shortcomings in consultation processes with affected indigenous communities, which in some cases have led to the exploitation of natural resources in the territories traditionally occupied or used by them without their free, prior and informed consent and without just and fair compensation paid to them, in violation of the Constitution (art. 75) and International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Committee was particularly concerned by the negative consequences of lithium exploitation in Salinas Grandes (Salta and Jujuy provinces) on the environment, access to water, way of life and subsistence of indigenous communities. In this connection, the Committee recommended that the State party undertake the necessary measures to stop violations of the rights of indigenous peoples and that it hold accountable those responsible for such unlawful acts. In this regard, it urged the State party to always enter into effective consultations with indigenous communities before granting concessions for the economic exploitation of the lands and territories traditionally occupied or used by them to State-owned companies or third parties, fulfilling the obligation to obtain the free, prior and informed consent of those who are affected by the aforementioned economic activities. The Committee also recommended that the State party guarantee that in no case would such exploitation violate the rights recognized in the Covenant and that just and fair compensation would be granted to indigenous communities. The Committee also called upon the State party to ensure the protection of indigenous communities during the implementation of mining exploration and exploitation projects. With regard to Salinas Grandes, the Committee urged the State party to comply with the decision of the Supreme Court. The Committee recalled in this context its statement on obligations of State parties regarding the corporate sector and economic, social and cultural rights (see E/C.12/2011/1 and E/C.12/ARG/CO/3, para. 9).

12. Finally, the Committee expressed concern about cases in which the increased use of chemical pesticides and transgenic soya seeds in regions traditionally inhabited or used by indigenous communities has negatively affected these communities. The Committee was worried that these communities find it increasingly difficult to apply their traditional farming methods; consequently, this may become an important obstacle to the access to safe, adequate and affordable food. The Committee also noted with concern the scale of deforestation that, in spite of Act No. 2633 on forest protection, has forced indigenous peoples to leave territories traditionally occupied or used by them. The Committee is further concerned that these activities are often carried out without effective prior consultation with the affected groups of the population. The Committee urged the State party to ensure that the means of subsistence of indigenous communities and their enjoyment of economic, social and cultural rights are effectively protected, and to develop institutional and procedural guarantees to ensure the effective participation of indigenous communities in decision-making on issues that affect them. The Committee also recommended that the State party ensure the full implementation of Act No. 2633 and other legislation regarding the protection of

non-renewable resources of the State party with a view to combating deforestation (see E/C.12/ARG/CO/E, para. 10).

13. In its concluding observations on New Zealand, adopted on 18 May 2012, the Committee expressed concern that the State party does not give sufficient protection to the inalienable rights of indigenous people to their lands, territories, waters and maritime areas, and other resources, as manifested by the fact that Maori free, prior and informed consent on the use and exploitation of these resources has not always been respected. The Committee called on the State party to ensure that the inalienable rights of Maori to their lands, territories, waters and maritime areas and other resources, as well as respect of the free, prior and informed consent of Maori on any decisions affecting their use, are firmly incorporated in the State party's legislation and duly implemented. The Committee also urged the State party to take the necessary measures to guarantee Maori right to redress for violations of these rights, including through the implementation of the recommendations of Waitangi Tribunal's proceedings, and to ensure that Maori receive proper compensation and enjoy tangible benefits from the exploitation of their resources (see E/C.12/NZL/CO/3, para. 11).

14. In its concluding observations on Peru, adopted on 18 May 2012, the Committee expressed concern that effective consultation and prior informed consent of indigenous peoples is not systematically sought in decision-making processes relating to the exploitation of natural resources in their traditional territories. The Committee recommended that the State party ensure that the implementation of the National Environmental Policy, Section 5, on mining and energy, as well as Act No. 29785 on the Right of Indigenous or Aboriginal Peoples to Prior Consultation, involves effective consultation and prior consent of indigenous peoples relating to the exploitation of natural resources in their traditional territories (see E/C.12/PER/CO/2-4, para. 23).

III. Human Rights Council

A. Resolutions

15. At its nineteenth session, held from 27 February to 23 March 2012, the Human Rights Council considered the question of the realization of the right of peoples to self-determination under agenda item 7 and adopted resolution 19/15 on the right of the Palestinian people to self-determination. The Council reaffirmed the inalienable, permanent and unqualified right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity, and to establish their sovereign, independent, democratic and viable contiguous State. The Human Rights Council urged all Member States and relevant bodies of the United Nations system to support and assist the Palestinian people in the early realization of their right to self-determination.

B. Special Procedures

16. The Special Rapporteur on the rights of indigenous peoples, James Anaya, presented his reports to the Human Rights Council at its eighteenth session on the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland

(see A/HRC/18/35/Add.2), on the situation of indigenous peoples in the Republic of Congo (see A/HRC/18/35/Add. 5) and on the situation of Kanak people in New Caledonia (see A/HRC/18/35/Add.6).

17. The Special Rapporteur paid particular attention to Sami self-determination at the national level, as exercised through the Sami parliaments, and the rights of Sami to their lands, territories and resources. He noted that while the laws and the policies of Nordic countries with respect to the Sami people are relatively advanced, there are still ongoing barriers to the full realization of the right of Sami people to self-determination, both at the cross-border and national levels.

18. The Special Rapporteur also stated that, despite having endured a history that divided their territory and people among four States, the Sami people have made remarkable efforts to maintain and strengthen bonds across the national boundaries and to advance their interests as one people. Several cross-border institutions have been formed to represent the interests of Sami people throughout the Sápmi region and play an important role in developing a Sami policy that applies beyond the State framework. The Special Rapporteur noted with satisfaction that Nordic Governments, for the most part, have not hindered cross-border Sami relations and at times have facilitated it.

19. Finally, the Special Rapporteur noted the important work that has been done towards the adoption of a Nordic Sami Convention and welcomed the commitment on the part of the Nordic States and the Sami parliaments to recommence negotiations in 2011 towards the adoption of the Convention.

20. Among his recommendations, the Special Rapporteur appealed to the Nordic States to continue and enhance their efforts to implement the right of the Sami people to self-determination and to more genuinely influence decision-making in areas of concern to them. Effective consultation arrangements that seek to ensure free, prior and informed consent about decisions directly affecting the Sami may assist to achieve this end. The Special Rapporteur recommended that the Nordic States introduce reforms as necessary to ensure that the Sami parliaments, as the highest representative of the Sami people, have greater independence from State institutions and authorities. Correspondingly, Nordic States should provide the Sami parliaments with funding sufficient for them to be able to effectively exercise their self-governance functions.

21. The Special Rapporteur highlighted that for the Sami people, as with other indigenous peoples throughout the world, securing rights over land and natural resources is fundamental to their self-determination, and it is considered a prerequisite for the Sami people to be able to continue to exist as a distinct people. In this regard, the Special Rapporteur, while recognizing the efforts of the Nordic Governments to advance the rights of Sami people to their lands, territories and resources, urged them to redouble their efforts in order to guarantee the Sami people a sustainable basis for their economic, social and cultural development.

22. Following his mission to the Republic of Congo, the Special Rapporteur on the Rights of Indigenous Peoples presented his report to the Human Rights Council at its eighteenth session on the situation of indigenous peoples in the country (see A/HRC/18/35/Add.5). Enhancing participation in decision-making is considered by the Special Rapporteur to be essential if all aspects of the initiatives being taken to advance the rights of indigenous peoples in the Congo are to be successfully

implemented. This requires, in accordance with the United Nations Declaration of the Rights of Indigenous Peoples, building greater opportunities for indigenous peoples to participate in decision-making processes of State institutions at all levels, as well as recognition, strengthening and accommodation of indigenous peoples own decision-making institutions and authority. Indigenous participation in various dimensions is instrumental to the right of self-determination and the empowerment of indigenous peoples to control their own destinies under conditions of equality. Advancing indigenous participation in decision-making also requires dedicated efforts in confronting and overcoming barriers to indigenous peoples and individuals being part of the State's political processes and governing institutions. Measures should be taken to ensure full and adequate opportunities for indigenous participation in legislative processes and government institutions at all levels. All efforts to develop programmes appropriate to the Congolese context should be done in consultation with indigenous peoples themselves.

23. Following his mission to New Caledonia, the Special Rapporteur stated that the system of customary justice of the Kanak people represents an important part of the exercise of self-governance and self-determination. The Special Rapporteur was pleased to learn that under French law decisions made in the customary system as to civil matters are generally respected by the State legal system. He recommended, however, that continued efforts be made to enhance the control of Kanak people over their communities, territories and natural resources, including providing effective recognition of their own institutions of authority and customary laws, to the extent compatible with universal human rights standards. Regarding Kanak participation in the political arena and governance as a fundamental aspect of the right to self-determination for indigenous peoples, the Special Rapporteur noted that even though the Nouméa Accord affirms an important level of recognition of Kanak participation in national decision-making, more needs to be done to enhance Kanak participation in decision-making at the territorial level (see A/HRC/18/35/Add.6). On lands and resources, the Special Rapporteur recognized the achievements of the Rural Development and Land Planning Agency in returning significant areas of land to Kanak ownership and control. He also recommended that France and the Government of New Caledonia make all necessary efforts to facilitate the resolution of outstanding claims and ensure that all legitimate Kanak land claims can proceed to a conclusion.

24. In his reported submitted to the twentieth session of the Human Rights Council, following his mission to assess, inter alia, the efforts to realize the Palestinian right of self-determination (see A/HRC/20/32), the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, recalled that it is beyond controversy that the Palestinian people enjoy an inalienable right of self-determination that is confirmed by article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and as set forth in the Charter of the United Nations. He also recalled that the General Assembly and the Security Council have both confirmed that the right of self-determination is possessed by the Palestinian people, and should be realized though a sustainable solution to the conflict and that the International Court of Justice viewed the construction of the separation wall on occupied Palestinian territory as a violation of the right of self-determination belonging to the Palestinian people (see A/HRC/20/32).

25. The Special Rapporteur expressed concerns regarding the issue of the settlements in the occupied Palestinian territories. He also expressed his continued concern about the human rights and humanitarian consequences of the illegal blockade of the Gaza Strip by the occupying Power and the denial of the right to self-determination inherent in the continuing occupation of Gaza.

IV. Conclusion

26. The right of self-determination is enshrined in article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights. During the reporting period, the human rights treaty bodies, and the Human Rights Council, including Special Procedures mandate holders, have continued to address issues related to the realization of this right.



General Assembly

Distr.: General
9 August 2012

Original: English

Sixty-seventh session

Item 70 (b) of the provisional agenda*

**Promotion and protection of human rights: human rights
questions, including alternative approaches for improving the
effective enjoyment of human rights and fundamental freedoms**

**Interim report of the Independent Expert on the promotion
of a democratic and equitable international order, Alfred
Maurice de Zayas**

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the independent expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, submitted in accordance with Human Rights Council resolution 18/6 and General Assembly resolution 66/159.

* A/67/150.



Interim report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas

Summary

In his first report to the General Assembly, the Independent Expert formulates preliminary views on the conceptual and legal framework of the mandate and highlights some of the epistemological challenges inherent in the notion of democracy at the domestic and international levels, as well as the implications of a culture of equity based on common sense and common interest. This report is inspired by the purposes and principles of the United Nations as proclaimed in the Charter and in pertinent United Nations and regional human rights norms, including the core human rights treaties and multiple declarations and resolutions adopted by the General Assembly. The Independent Expert will cooperate with other special procedures of the Human Rights Council and endeavour to coordinate his work with that of other United Nations bodies, including the specialized committees and commissions of the General Assembly and the Security Council, the Advisory Committee of the Human Rights Council and the United Nations human rights treaty bodies. He will undertake to liaise with the World Trade Organization, the World Bank, the International Monetary Fund, the International Labour Organization, the World Health Organization, the World Intellectual Property Organization, the United Nations Conference on Trade and Development, the United Nations Educational, Scientific and Cultural Organization and the Office of the United Nations High Commissioner for Refugees. He has sent questionnaires to and is conducting consultations with stakeholders and academics in all regions of the world.

The Independent Expert will submit his preliminary report to the Human Rights Council at its twentieth session, in September 2012. The present report focuses more on the policy-making mandate of the General Assembly and addresses a number of real and potential obstacles to the realization of a democratic and equitable international order, endeavouring to identify some good practices and lessons learned, both at the international and domestic levels. Bearing in mind that certain world events have called into question the authority of the United Nations, it is important for the Assembly to reassert its role as the pre-eminent world forum and to ensure that the Charter is respected as a world constitution. Recalling that the preamble to the Charter of the United Nations begins with the words "We the people", greater voice should be given to civil society, and world public opinion should be measured more objectively, and listened to, so as to ensure that the needs of peoples are not supplanted by economic and geopolitical interests.

Contents

	<i>Page</i>
I. Mandate and methodology	4
A. Human Rights Council resolution 18/6	4
B. Activities of the mandate holder	4
C. The concepts of democracy and equity	5
D. International democratic order	7
E. Consultations, questionnaires, thematic reports	9
II. Pronouncements of the General Assembly	10
A. The Charter of the United Nations as world constitution	10
B. Normative framework	11
C. Ethical and historical perspective	11
III. Complementarity and coordination with other mechanisms	12
IV. Obstacles to the realization of an international order that is more democratic and more equitable	14
V. Good practices and promising trends	19
VI. Moving forward	21

I. Mandate and methodology

A. Human Rights Council resolution 18/6

1. In its resolution 18/6, the Human Rights Council established, for a period of three years, a special procedure entitled "Independent Expert on the promotion of a democratic and equitable international order".

2. In paragraph 17 of the resolution, the Council requested the Independent Expert to present his first report to the Council at its twenty-first session, in September 2012. Bearing in mind that the Independent Expert assumed his functions on 1 May 2012, this interim report, submitted in accordance with General Assembly resolution 66/159, should be understood as a *tour d'horizon* of the multiple aspects of the resolution. While the mandate may appear overbroad or abstract, the intention of the Council is to give practical application to human rights norms in the international order, thus requiring the Independent Expert to formulate pragmatic solutions. The individual and collective dimensions of the resolution will be taken into account, recognizing the individual's entitlement to civil, political, economic, social and cultural rights and the inter-State commitment to respect each State's sovereignty, ensuring equitable participation by all States in the international order, including global decision-making and equitable commercial and financial relations.

3. The mandate calls for the identification of obstacles and best practices and for the formulation of proposals and recommendations on possible action. While norms and mechanisms exist, an important implementation gap prevails. The mandate holder is consulting stakeholders and is cooperating with other mandate holders. One task is to identify trends and desires for reform of the international order and energize public opinion to demand and carry out such reforms at the local and regional levels, ultimately affecting the international order from the grass roots up. The Independent Expert is aware of decades of General Assembly pronouncements on these issues and will be guided by pertinent resolutions, including 61/160, 63/189 and 65/223.

B. Activities of the mandate holder

4. In June 2012 the Independent Expert participated in the workshop he convened on human rights and international solidarity, and in the nineteenth annual meeting of special procedures mandate holders. Both events provided useful insights. During the twentieth session of the Human Rights Council the Independent Expert participated in numerous side events, including the meeting on fighting violence against women through promoting the right to peace, where his intervention focused on the contribution of women in promoting the right to peace, democracy and an equitable order. On 2 July and 3 September he lectured on the scope and potential of the mandate at the University of Geneva and, on 10 July, held a consultation with civil society at the Office of the United Nations High Commissioner for Human Rights (OHCHR). On 27 July the Independent Expert issued a press release calling on States to persevere in negotiations and to adopt a legally binding arms trade treaty to limit and regulate the arms trade. As noted above, in September he is to present his preliminary report at the twenty-first session of the Human Rights Council and in October will participate in the Council's Social Forum on people-centred development and globalization.

5. The Independent Expert has sent questionnaires to States, intergovernmental organizations, national human rights institutions and civil society, seeking their views and requesting assistance in identifying obstacles and good practices. He has received requests from stakeholders concerning areas that require in-depth study. He welcomes information at: ie-internationalorder@ohchr.org.

C. The concepts of democracy and equity

6. The preliminary task of the mandate is a review of the various definitions of the notion of "democracy", which States use with varying content. Internationally the concept entails due respect for the independence and sovereign equality of States and the need to ensure that the international order allows meaningful participation in global decision-making by all States and is not a closed shop governed by a few powerful States intent on imposing their economic and geopolitical priorities. Domestically, the bottom line is that the people (*demos*) in each country should meaningfully influence the policies and practices of Government.

7. Democracy is more than just a political concept; it also has economic, social, anthropological, ethical and religious dimensions. The rule of law is not identical with positivism, but must be animated by Montesquieu's *Esprit des lois* (1748), the existence of an independent judiciary, moderation, a culture of dialogue, negotiation and compromise, and a conviction that in human rights terms there cannot be any "legal black holes". Finally, it should be recalled that the ritual invocation of the word "democracy" does not make it happen. Societies must work in good faith to make it function, ensuring genuine participation by the population. At the same time common sense also tells us to beware of the excesses of "militant democracy", a rather bizarre concept, which in some circumstances may even assume totalitarian overtones, and to abandon the fantasy that democracy can be exported or imposed by force. The respect for national sovereignty mandated in the Charter also means respect for the national identity of countries. The General Assembly has been promoting a more democratic and equitable international order by its pronouncements on self-determination, decolonization, disarmament and the right to peace.

8. Moreover, democracy is not merely a formal State structure or a pro forma holding of elections, but the correlation between the will of the people and the actions of its elected representatives. The will of the people must also be genuine and not the result of populism, demagoguery, manipulation by national or international lobbies and cartels, or distortion through consumerism, intimidation or fear. It should also be kept in mind that although "democracy" is a better form of government than others, it is not a panacea for all the ills of mankind; thus, it is necessary to come to grips with the paradoxes of democracy, of freedom, of the rule of law, of ethical values, etc. Majority rule must not negate minority rights, the right to be different, to practise one's own culture, and to one's individuality and identity. Democracy without equity and without *caritas* can engender human rights violations including extreme poverty and food insecurity. Democracy must always be tempered by a constant awareness of the inherent dignity of the person, by the overarching principle of social justice, bearing in mind that while competition is necessary and useful for material progress, in the absence of a sense of solidarity, competition may become predator behaviour.

9. Whereas every member of the General Assembly has an equal right to vote, and the will of a majority of Governments deserves respect, consideration must also be given to the fact that some States have very large populations and only a single vote, posing a problem of weighting. Moreover, the unequal economic and political power of States may lead to inequitable results, especially when a few powerful States frustrate the expressed will of democratically elected Governments representing hundreds of millions of human beings. A problem of credibility also arises when a large number of General Assembly resolutions remain unimplemented, although adopted by consensus or near unanimity.

10. The Independent Expert acknowledges earlier pronouncements of the General Assembly concerning democracy, e.g. in resolution 55/96 on promoting and consolidating democracy, 57/221 on strengthening the rule of law and 59/201 on enhancing the role of regional,¹ subregional and other organizations and arrangements in promoting and consolidating democracy, as well as resolution 50/172 entitled "Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes", in which the Assembly recognized "that there is no single political system or single universal model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors". Similarly, the Human Rights Council, in its resolution 19/36 on human rights, democracy and the rule of law, reaffirmed in a preambular paragraph that "while democracies share common features, there is no single model of democracy and that democracy does not belong to any country or region", and stressed "the necessity of due respect for sovereignty and the right to self-determination". Thus, it should be clear that the way towards democracy — both nationally and internationally — is arduous and that countries should devise their own democratic institutions and mechanisms consistent with their culture and traditions, but also grounded in universal human rights.

11. The Independent Expert will also explore the practical scope of the concept of "equity", going back to the Socratic notion of moderation and the Aristotelian approach to justice (*Ethics*) as equality of treatment, that is, like cases being treated alike, unlike cases differently. The concept of an equitable international order must also be circumscribed. Surely it cannot mean international charity, or a utopian system based on the doctrine "from each according to his ability, to each according to his needs". The concept does entail international solidarity and an effort to end exploitation, eradicate extreme poverty, abolish privilege, provide fair prices for goods and services, promote development and technology transfer, combat corruption, bribery and unearned commissions, and achieve the Millennium Development Goals. An equitable international order requires that international law be applied and enforced uniformly and not selectively, that violations of human rights be condemned without preferences or privilege, and that sanctions against violators be imposed objectively, taking due care that Governments and not the innocent populations are affected.

12. How can the existing international order evolve so that it will be more democratic and more equitable? Certain conditions appear necessary, foremost among them peace (*Pax optima rerum*) in the holistic sense, encompassing not only the

¹ Cf. Inter-American Democratic Charter, adopted by the General Assembly of the Organization of American States on 11 September 2001.

absence of war but also positive harmony; the absence of structural violence, cultural hegemonism, neocolonialism and discrimination; and the eradication of extreme poverty as envisaged in the Millennium Development Goals. At the request of the Human Rights Council, OHCHR conducted a workshop on 15 and 16 December 2009 in which experts and civil society participated. Its report (A/HRC/14/38) was presented to the Council in June 2010 and led to the adoption of resolution 14/3 in which the Council requested the Advisory Committee to prepare a draft declaration on the right to peace and to report to the Council thereon at its seventeenth session. The Advisory Committee constituted a drafting group and submitted a progress report (A/HRC/17/39 and Corr.1). Pursuant to Council resolution 17/16, the Advisory Committee submitted its draft declaration on the right to peace (A/HRC/20/31, annex) to the Council at its twentieth session in June 2012. The Council considered the draft and adopted resolution 20/15 establishing an open-ended intergovernmental working group to continue the codification process.

D. International democratic order

13. The Independent Expert considers that the right of all peoples to self-determination constitutes a peremptory norm and is binding for all States. It entails the right to independence and freedom from foreign rule or occupation, freedom from economic exploitation as well as permanent sovereignty over natural resources. The right of self-determination is laid down in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

14. Hitherto, democracy has been understood primarily in the domestic context. Article 25 of the International Covenant on Civil and Political Rights stipulates that "every citizen shall have the right and the opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives". The Human Rights Committee, in its general comment No. 25 (1996) on article 25, confirmed that "[it] lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant", and that "[f]reedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected". Moreover, in addition to article 25, the case law of several States also refers to this principle. However, the implicit existence of a right of all peoples to democracy does not presuppose a prerogative of States to interfere in the domestic affairs of other States. Contrary to some trends and perceptions, the idea of the "responsibility to protect", contained in General Assembly resolution 60/1, the World Summit Outcome, did not replace the Charter-mandated international law of non-interference in the internal affairs of sovereign States. The responsibility to protect is not a *lex specialis* that derogates from Article 2, paragraphs 3, 4 and 7, or any other provision of the Charter. This is all the more true as in 2005 world leaders declared that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity".² The principle of non-intervention remains very much valid and is confirmed in countless resolutions of the General Assembly and the Human Rights Council. Therefore, responsibility to protect must not be abused to circumvent the Charter or engage in sabre-rattling or propaganda for war,

² General Assembly resolution 60/1, para. 138.

which is specifically prohibited by article 20 of the International Covenant on Civil and Political Rights. Any intervention in other States must satisfy strictly defined benchmarks and take place only as an *ultima ratio*. In July 2009, the General Assembly revisited the responsibility to protect doctrine, holding a plenary debate on the question. The President of the Assembly identified four benchmark questions that should determine whether and when the system of collective security could implement the responsibility to protect:

(a) Do the rules apply in principle, and is it likely that they will be applied in practice equally to all States, or, in the nature of things, is it more likely that the principle would be applied only by the strong against the weak?;

(b) Will the adoption of the responsibility to protect principle in the practice of collective security be more likely to enhance or undermine respect for international law?;

(c) Is the doctrine of responsibility to protect necessary and, conversely, does it guarantee that States will intervene to prevent another situation like the one that occurred in Rwanda?;

(d) Does the international community have the capacity to enforce accountability upon those who might abuse the right that the responsibility to protect principle would give States to resort to the use of force against other States?

15. In this context, it should be recalled that the Charter of the United Nations imposes certain *erga omnes* obligations on States. One of those obligations is to condemn the illegal use of force and to deny recognition of territorial changes arising from the illegal use of force. While there is an international responsibility to protect, there is, first and foremost, an international responsibility to protect humanity from the scourge of war and, most importantly, to protect humanity from weapons of mass destruction, including nuclear weapons.

16. Whereas international human rights law has traditionally been regarded in terms of States' relations with their inhabitants, the Independent Expert's mandate presupposes addressing the links between an international democratic order and domestic democracy. The Independent Expert is of the view that key elements of democracy — which include, inter alia, equity, participation, the rule of law and an independent judiciary backed up by accountability — are hardly present at the international level. International democracy is often questioned by the ability of some powerful States and non-State actors to subvert the clear will of the majority of the people and States. In this context, an example of what could constitute a form of international democracy is the application of international law as the basis for State conduct, and of the Charter as a world constitution. However, lack of enforcement of international norms, in particular human rights, refugee and humanitarian norms, is a reminder that the conduct of States is not always constrained by international law.

17. While international democracy is not a precondition for the existence of democracy at the national level, there is a need to recognize democracy "as an international principle, applicable to international organizations and to States in their international relations. The principle of international democracy does not only

mean equal or fair representation of States; it also extends to the economic rights and duties of States".³

18. Moreover, the right of all peoples to participate in the conduct of public affairs at the national level must also be accompanied by their ability to do so in the international relations of States. In this context, meaningful participation of civil society in the conduct of public international affairs depends on the full realization of domestic democracy. This is particularly relevant as the legitimacy of the foreign actions of States must represent the actual wishes of people, and facilitate the meaningful participation of independent civil society organizations in international decision-making bodies. We are in a unique period of history, when trends and aspirations are coming together. It is not only the social media and the new vistas of information and knowledge that the Internet has opened to civil society; it is a period of liberation from old taboos and empowerment of civil society. The concept of the *indignados*, the Occupy movements in various countries, shows that civil society wants to claim its democratic rights which external factors such as the markets have taken away.

19. International democracy should not be confined only to States Members of the United Nations. Due regard for the principle of self-determination as a peremptory norm of international law must be observed for non-self-governing territories and other unrepresented peoples. In its general comment No. 12 (1984) on self-determination, the Human Rights Committee called it "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".

E. Consultations, questionnaires, thematic reports

20. Through early consultations conducted by the Independent Expert and correspondence received from stakeholders, as well as answers to the questionnaires, a number of suggestions for thematic studies emerged: (a) the nature of democracy, its diverging meanings domestically and internationally; (b) the notion of equity; (c) the links between self-determination and democracy; (d) the right of participation of unrepresented peoples; (e) the concept of "participation"; (f) the relationship between democracy and freedom of opinion and expression and access to information (including unduly classified information), peaceful assembly and association, good governance and an independent judiciary; (g) self-censorship and "political correctness"; (h) cartels, lobbies and pressure groups; (i) free, genuine and competitive elections (including issues of election fraud and civil unrest, election financing and buying votes); (j) the impact of the financial markets on democracy and equity; (k) the influence of transnational corporations and other private-sector actors on the international order; (l) the impact of the military-industrial complex, military expenditures and war on democracy and equity, and the need to liberate financial resources to achieve the Millennium Development Goals; (m) the non-implementation of treaties and agreements; (n) control over natural resources; (o) corruption in Government, business and society; and (p) fair trade, free trade agreements and adverse trade relations.

³ Universal Declaration on Democracy, adopted by the Governing Council (formerly the Inter-Parliamentary Council) of the Inter-Parliamentary Union at its 161st session (Cairo, 16 September 1997), art. 24.

21. In the course of his mandate the Independent Expert shall undertake in-depth studies and submit thematic reports to the Human Rights Council and the General Assembly on these and other topics.

II. Pronouncements of the General Assembly

A. The Charter of the United Nations as world constitution

22. In a very real sense, the Charter of the United Nations can be described as the world constitution. All States are bound by it and should orient their policies and practices according to its purposes and principles. Paramount is the commitment "to save succeeding generations from the scourge of war" through meaningful disarmament and fulfilling the promise to turn swords into ploughshares and end internal and international warfare.

23. The Universal Declaration of Human Rights is an emanation of the Charter and constitutes a minimum standard which must be respected not only by States, but also by individuals.

24. The world financial crisis is a result not only of toxic loans by irresponsible bankers but also of the enormous waste caused by recurrent armed conflicts and by the inordinate proportion of national budgets devoted to the development of all kinds of armaments, including weapons of mass destruction, which threaten the survival of humanity⁴ and violate article 6 of the International Covenant on Civil and Political Rights.⁵ The Charter also stipulates the promotion of human rights, development and friendly relations based on respect for the principle of equal rights and self-determination of peoples. The application of the Charter is further governed by general principles of law such as equity, good faith, victims' right to reparation, estoppel, and the overarching principles of equality, non-discrimination and the common heritage of mankind.

25. Law, however, is not mathematics, and the mere existence of norms does not ensure their enforcement. Political will and good faith are needed to set up and maintain an appropriate implementation machinery. Thus, the General Assembly has more than a standard-setting function; it also has the practical task of monitoring compliance with the Charter and its own resolutions, establishing enforcement mechanisms, proposing advisory services and technical assistance to States and, if need be, recommending the imposition of sanctions on non-complying States. Admittedly, pronouncements of the General Assembly would not be binding, as are the decisions and resolutions of the Security Council, but States would feel strengthened in their resolve to impose sanctions by relying on the rationale and the legitimacy of General Assembly resolutions justifying their imposition.

⁴ Mikhail Gorbachev, "Resetting the nuclear disarmament agenda", Geneva Lectures Series, 5 October 2009.

⁵ Human Rights Committee, general comment No. 14 (1984).

B. Normative framework

26. In his report to the Human Rights Council (A/HRC/21/45)⁶ the Independent Expert has elaborated on the normative framework, which is incorporated herein by reference. Particularly relevant to Council resolution 18/6 are several General Assembly resolutions, including: (a) resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, which established the principle of self-determination as the foundation of a new world order; (b) resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; (c) resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order; (d) resolution 3202 (S-VI), Programme of Action on the Establishment of a New International Economic Order; (e) resolution 3314 (XXIX), Definition of Aggression; (f) resolution ES-10/15, Advisory opinion of the International Court of Justice on the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including East Jerusalem; (g) resolution 65/223, Promotion of a democratic and equitable international order.

27. The Independent Expert will build on the studies already conducted by the Commission on Human Rights, the Subcommission on the Promotion and Protection of Human Rights, the Human Rights Council and its Advisory Committee, as well as on the work of the family of special rapporteurs, General Assembly and Commission on Human Rights resolutions on the right of peoples to peace (Assembly resolution 39/11, Commission resolution 2002/71), and numerous studies of the Subcommission, including the final report of the Special Rapporteur on the human rights dimensions of population transfer, Awn Shawkat Al-Khasawneh (E/CN.4/Sub.2/1997/23 and Corr.1), identifying numerous gross violations of self-determination, democracy and equity inherent in every form of "ethnic cleansing";⁷ the final report of the Special Rapporteur on treaties, agreements and other constructive arrangements between States and indigenous persons, Miguel Alfonso Martínez (E/CN.4/Sub.2/1999/20); and the report of the Rapporteur of the drafting group of the Advisory Committee on enhancement of international cooperation in the field of human rights (A/HRC/AC/8/3).

C. Ethical and historical perspective

28. It is appropriate to recall that the objectives of the present mandate reflect aspirations expressed by the leaders of many countries, even before the creation of the United Nations. For instance, United States President Franklin Roosevelt articulated universal hopes in his "Four Freedoms" address of 6 January 1941, notably the freedom from want and the freedom from fear. These principles were confirmed in the eight-point peace plan known as the Atlantic Charter of August 1941, subsequently adhered to by 26 Governments in the Declaration by United Nations of 1 January 1942. The second principle of the Atlantic Charter stipulates that the anti-Hitler coalition "desire to see no territorial changes that do not accord

⁶ Forthcoming.

⁷ The report was endorsed by the Commission and the Economic and Social Council but never transmitted to the General Assembly for adoption of its conclusions. A. de Zayas, "Forced Population Transfer", in *Max Planck Encyclopedia of Public International Law*, R. Wolfrum, ed., vol. IV (2012), pp. 165-175.

with the freely expressed wishes of the peoples concerned"; the third principle provides that "they respect the right of all peoples to choose the form of government under which they will live"; the fourth principle commits States to promote "the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity"; and the eighth principle reaffirms the need for disarmament.

29. As to freedom from fear, Aung San Suu Kyi expressed it well:

Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure. A most insidious form of fear is that which masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage, which help to preserve man's self-respect and inherent human dignity. It is not easy for a people conditioned by fear under the iron rule of the principle that might is right to free themselves from the enervating miasma of fear. Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man.⁸

30. In his book *Indignez-vous! (Time for Outrage)*, Stéphane Hessel similarly calls for taking responsibility in our hands and demanding change. Such courage is being expressed in many countries by civil society, indignant at the failures of and abuses by Government. For centuries it has been the role of poets and novelists to use literature to promote a more ethical order, from Aristophanes to Ibn Rushd, Erasmus of Rotterdam, Jean Jacques Rousseau, Friedrich von Schiller, Harriet Beecher Stowe, Wilfred Owen, Lu Xun, Anna Akhmatova, Gabriel García Márquez, Vaclav Havel, Arundhati Roy and Wole Soyinka.

III. Complementarity and coordination with other mechanisms

31. The Independent Expert will liaise with Charter-based and treaty-based mechanisms and build on United Nations initiatives such as the Global Compact.⁹ He will coordinate his work with that of other United Nations bodies, including the Third Committee of the General Assembly, the Special Committee on Decolonization, the International Law Commission, the Disarmament Commission and the Committee on the Exercise of the Inalienable Rights of the Palestinian People.

32. The United Nations human rights treaty bodies are seized of situations and individual cases on matters related to this mandate and have adopted many pertinent decisions in this respect. Their jurisprudence, in the form of case law,¹⁰ concluding observations and general comments, will enrich the reports of the Independent Expert; he will also rely on recommendations emanating from the universal periodic review and on the work of special procedures.

⁸ Aung San Suu Kyi, "Freedom from fear", acceptance message for the 1990 Sakharov Prize for Freedom of Thought, 1991.

⁹ www.unglobalcompact.org/issues/human_rights/Human_Rights_Working_Group.html.

¹⁰ Jakob T. Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (Kehl, Germany, N. P. Engel, 2009).

33. The Independent Expert will follow the progress achieved by the high-level panel of eminent persons to advise the Secretary-General on the post-2015 agenda and will endeavour to liaise with the new Special Adviser to the Secretary-General on Post-2015 Development Planning. Attention will be paid to the programmes established by several United Nations agencies with objectives related to those of this mandate. In the field of labour law, the International Labour Organization (ILO) promotes social justice through standard-setting and monitoring; its motto, *Si vis pacem cole justitiam* (If you desire peace, cultivate justice), could well be the motto of this mandate and report.

34. The World Trade Organization (WTO) has the opportunity to promote a more equitable international order by mainstreaming human rights principles into its policies and programmes, including the Doha Development Agenda, pursuant to its commitment to achieve the agreed objective of rebalancing trade rules so that developing countries can benefit from enhanced equitable commerce. The Independent Expert will study the relevant reports of WTO, the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the International Monetary Fund (IMF) and evaluate criticism by think tanks, academics and civil society.¹¹

35. The United Nations Educational, Scientific and Cultural Organization (UNESCO) advances international understanding through culture and is committed to the promotion of world peace, as expressed in the preamble to its Constitution: "[S]ince wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed". In this spirit, in 1997 UNESCO President Federico Mayor issued a declaration entitled "The Human Right to Peace". Of continued relevance are the UNESCO Culture of Peace Programme and the Declaration and Programme of Action on a Culture of Peace adopted by the General Assembly by its resolution 53/243. On 12 November 1997, the General Conference of UNESCO adopted the Declaration on the Responsibilities of the Present Generations towards Future Generations.

36. The Independent Expert will seek synergies with civil society and intergovernmental initiatives, including those of the Inter-Parliamentary Union, the Alliance of Civilizations, the United Nations Institute for Disarmament Research and regional organizations, which may further contribute to the realization of a more democratic and equitable international order. The Independent Expert will study the report of the thematic debate convened by the President of the General Assembly on 22 March 2012 on fostering cross-cultural understanding for building peaceful and inclusive societies.

37. Civil society initiatives have born fruit, such as the World Campaign on the Human Right to Peace, organized by the Spanish Society for International Human Rights Law (www.aedidh.org), which conducted a four-year worldwide consultation process culminating in December 2010, in Santiago de Compostela, Spain, with the convening, in the context of the World Social Forum on Education for Peace, of the International Congress on the Human Right to Peace. The Congress adopted the Santiago Declaration on the Human Right to Peace, which revised the earlier Luarca

¹¹ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books, 2007).

Declaration¹² in the light of inputs from different cultural sensibilities.¹³ The Congress also adopted the Statutes of the International Observatory of the Human Right to Peace, which were endorsed by some 2,000 civil society organizations, as well as numerous public institutions and the 22 States attending the Ibero-American Summit,¹⁴ and which became operative on 10 March 2011.

IV. Obstacles to the realization of an international order that is more democratic and more equitable

38. The Independent Expert is holding consultations with stakeholders to learn what they perceive to be major obstacles and good practices for the realization of an international order that is more democratic and equitable. Focused questionnaires have been addressed to all stakeholders and further questionnaires will be forwarded over the next three years.

39. After informal consultations with permanent missions, intergovernmental organizations and non-governmental organizations, in particular academic communities of several countries, and subsequent study of relevant literature, the Independent Expert has become aware of numerous concerns that require further study, including the postulate of a hierarchy of human rights as one of the remaining ideological debates between developed and developing countries. In his view, civil, political, economic, social and cultural rights are not only interdependent, but they also have equal value and importance.

40. With regard to a more democratic international order, some observers have signalled the need to reform the United Nations and, in particular, the composition of the Security Council so as to make it more responsive to the needs of the 193 States Members of the United Nations. The Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council is exploring the modalities of Security Council reform. In his report entitled "In larger freedom: towards development, security and human rights for all", Secretary-General Kofi Annan proposed an enlargement of the Security Council to 24 members (A/59/2005, paras. 168-170). Such enlargement could theoretically be achieved through amendment of the Charter (Art. 108), provided that the permanent members of the Security Council agree.

41. Other observers have pointed out that the theoretical equality of the Westphalian State system is brought into question by the realities of power politics,

¹² See Carmen Rosa Rueda Castañón and Carlos Villán Durán, eds., *La Declaración de Luarca sobre el Derecho Humano a la Paz*, 2nd ed. (Granda Siero, Asturias, Spain, Ediciones Madú, 2008); *Contribuciones Regionales para una Declaración Universal del Derecho Humano a la Paz*, Carlos Villán Durán and Carmelo Faleh Pérez, eds. (Luarca, Asturias, Spain, Asociación Española para el Derecho Internacional de los Derechos Humanos, 2010).

¹³ *Contribuciones Regionales para una Declaración Universal del Derecho Humano a la Paz*, *ibid.*

¹⁴ Carlos Villán Durán, "The Human Right to Peace: A Legislative Initiative from the Spanish Civil Society", *Spanish Yearbook of International Law*, vol. 15 (Martinus Nijhoff, 2009), pp. 143-171; Carlos Villán Durán, "Civil Society Organizations' Contribution to the Universal Declaration on the Human Right to Peace", *International Journal on World Peace*, vol. XXVI, No. 4 (December 2011), pp. 59-126; A. de Zayas, "Peace as a Human Right", in A. Eide and others, eds., *Making Peoples Heard* (Martinus Nijhoff, 2011), pp. 27-42.

economic imbalance and adverse trade relationships. Indeed, the overwhelming economic power of some countries renders illusory the aspiration to sovereignty of many poorer countries. In the United Nations votes are often influenced by economic carrot-and-stick practices, and some weaker economies must bend to diplomatic and other forms of pressure.

42. In paragraph 32 of the above-mentioned report the Secretary-General observed:

In 2005, the development of a global partnership between rich and poor countries ... needs to become a reality. ... Each developing country has primary responsibility for its own development — strengthening governance, combating corruption and putting in place the policies and investments to drive private sector-led growth and maximize domestic resources available to fund national development strategies. Developed countries, on their side, undertake that developing countries which adopt transparent, credible and properly costed development strategies will receive the full support they need, in the form of increased development assistance, a more development-oriented trade system and wider and deeper debt relief. All of this has been promised but not delivered. That failure is measured in the rolls of the dead — and on it are written millions of new names each year.

43. Some observers, like George Soros,¹⁵ have expressed concern at “market fundamentalism”, a philosophy that has much in common with social Darwinism and assumes that a laissez-faire policy is always the optimal solution.¹⁶ “Corporatocracy”, unfair taxation, uncontrolled markets, currency speculation and runaway finance impact negatively on both democracy and equity.

44. It has long been noted that certain transnational corporations are wealthier and more powerful than some States. Strategies and guidelines must be developed to ensure that international business and trade promote rather than hinder a democratic and equitable international order. The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, established by the Human Rights Council in its resolution 17/4, is tasked with promoting human rights in this area. The Independent Expert will consult with the members of the Working Group in order to cross-fertilize and avoid duplication.

45. Globalization¹⁷ raises many human rights issues, and it is in the interest of Governments, transnational corporations and civil society that the opportunities offered by globalization be used to advance and not to restrict the enjoyment of human rights. The Independent Expert will explore the impact of globalization on the realization of an international order that is more democratic and more equitable, and how to reconcile the tensions between, on the one hand, the legitimate interest in profit and trade expansion and, on the other hand, the right of States, large and small, to sovereignty, control over their natural resources, and to decide their

¹⁵ George Soros, *The New Paradigm for Financial Markets: The Credit Crisis of 2008 and What it Means* (Public Affairs, 2008). See also George Soros' interview with Bill Moyers on 10 October 2008, available at www.pbs.org/moyers/journal/10102008/watch.html.

¹⁶ Michael Sandel, *What Money Can't Buy: The Moral Limits of the Markets* (Farrar, Straus and Giroux, 2012).

¹⁷ See Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W. W. Norton, 2011); Jeffrey Sachs, *The Price of Civilization* (Random House, 2011).

domestic policies for full employment, education, health care and equity, and the right of peoples to self-determination.¹⁸

46. Military expenditures, the power of the military-industrial complex, the overt and covert trade in weapons and international organized crime, in particular drug trafficking, money-laundering and corruption of Government officials and non-State actors, continue to have a deleterious effect on the proper functioning of democracy in many countries. The Independent Expert deplores the failure of States to adopt a landmark United Nations arms trade treaty in July 2012, which would have regulated an industry valued at more than \$60 billion. Further talks and a General Assembly vote endorsing the draft arms trade treaty are urgently needed. The impact of the "war on drugs" and the "war on terror" on the rule of law also deserves close attention. The killing and harassment of journalists, reprisals against human rights defenders, censorship and deliberate disinformation by Government and private-sector media frustrate the democratic goal of empowering the population to develop responsible opinions upon which to act in the political arena. Frequently, news reporting and commentary avoid the crucial issues and distract attention with red herrings of all kinds. Observers have noted that all too often the crucial issues are ignored. Such practices undermine democracy.

47. Concern has been expressed about the role of religious institutions in the conduct of public affairs. The Independent Expert would like to explore how religious institutions can also contribute to a more democratic and equitable international order, as well as to greater democracy and equity domestically.

48. The International Expert considers that the emergence of a democratic international order would be advanced by the participation of the growing number of States that are implementing democratic principles domestically.

49. From the domestic perspective, obstacles to the promotion of a more democratic international order include a lack of correlation between the will of the people and the policies and practices adopted by their Governments — even democratically elected Governments — and reflect an epistemological and perception gap between the governing elites and the population at large. This lack of correlation may be attributable in part to the "psychology" of power, but also to the deliberate distortion or manipulation of public opinion.¹⁹

50. It is generally recognized that a well-informed civil society is a condition of democracy. A country where public opinion is manipulated by the Government or private media cannot have a functioning democracy. Censorship, whether conducted by States or by press conglomerates, distorts reality and undermines democracy. Who is financing the media and what gets printed are important issues in understanding the degree of press freedom and to what extent big media smother the independent press. Self-censorship as a result of intimidation or social pressures, sometimes referred to as "political correctness", constitutes a serious obstacle to the proper functioning of democracy. It is important to hear the views of all persons,

¹⁸ *Recreating Democracy in a Globalized State*, Cliff Durand and Steve Martinot, eds. (Clarity Press, 2012); Noam Chomsky, *Profit over People: Neoliberalism and Global Order* (Seven Stories Press, 1999).

¹⁹ Tzvetan Todorov, *Les ennemis intimes de la démocratie* (Paris, Robert Lafont, 2012); Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon, 2002).

including the "silent majority", and to give heed to the weaker voices. There is little hope for an international democratic order as long as democracy is lacking at the national level. Therefore, it is imperative to focus attention on education and access to information, including via the Internet, to enable people to freely develop their own opinions. Direct or indirect censorship, whether through State or private-sector agencies, undermines opinion-building and constitutes an obstacle for the individual and the society at large to exercise civic responsibilities, including the right to participate in the conduct of public affairs.

51. Paragraphs 2 and 3 of general comment No. 34 (2011) of the Human Rights Committee state:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

Some pressure groups, lobbies and professional public relations companies may hijack political decision-making and leave large parts of the population effectively disenfranchised.

52. While the outward face of democracy may be a multiparty system and regular elections, some observers contend that there is a substantial difference between the right to vote and the right to choose policies. If the choice of candidates for election does not correspond to the desires of the people, then a pro forma election among candidates who have been put up by political machines does not further the credibility or legitimacy of such democracies. This is not democracy but "partitocracy".²⁰ If the only choices are between candidates A and B, whose programmes are often very similar, the electorate does not have a real voice and the election does not satisfy the essence of what democratic government must be. (In such cases, the two-party system shows itself to be twice as democratic as the one-party system.) True democracy requires real choices as well as transparent and accountable governance and administration in all sectors of society. In other cases party machines fail to advance a representative number of female candidates. Citizens have a right to be given greater opportunity to participate in the conduct of public affairs, particularly by general consultations through referendums on issues, not merely by voting for individuals whose loyalties are not always with their electorates but, more often than not, with the rich sponsors who finance their political campaigns. In this context, many observers have noted that election campaigns in many countries entail enormous expenditures and that the choice of candidates is frequently dependent on their financial strength, resulting in a kind of elitist "elective dictatorship" or plutocracy, manifesting a disconnect between the people and the exercise of political power.

53. Obstacles of a more general nature are the historical inequities left by centuries of slavery, colonialism, imperialism and foreign occupation (which persist

²⁰ See the work of the Italian political scientist Giovanni Sartori.

in some areas even today).²¹ It is obvious that those persons and countries that enjoy privileges have an interest in maintaining the status quo and are reluctant to relinquish their advantages. Another general obstacle is the obsolete and self-righteous "clash of civilizations"²² mentality, which is incompatible with international solidarity and must not be allowed to become a self-fulfilling prophecy.

54. Other generic obstacles include lack of ethics,²³ endemic power asymmetries, racism, taboos, "conspiracies of silence", "political correctness", self-censorship, lack of transparency (particularly in the financial sector), lack of accountability, abuse of rights, selectivity, lack of objectivity, double standards, international law à la carte, unilateral measures, discrimination among victims, intellectual dishonesty, political hubris and common greed.

55. Aware that the status quo itself hampers the realization of an international order that is more democratic and equitable, the Independent Expert intends to explore ways and means of overcoming these obstacles. The dynamics of economic power must change if progress and a more inclusive and balanced growth paradigm are to be achieved.

56. The Independent Expert believes that the process of establishing a democratic and equitable international order is not likely to move ahead as long as Governments are not truly representative of their constituencies, and as long as economic exploitation, colonization and neo-colonization continue and territories continue to be occupied for strategic, military or economic purposes.

57. There is much room — as well as need — for improvement. States, the United Nations, intergovernmental organizations, non-governmental organizations and civil society all need to identify and overcome obstacles in their respective areas of competence and influence. This is required by a post-Charter international order that is based on a post-predator world consensus.

58. We need a renewed commitment to the Charter as the constitution of the modern world. We need to discover where, why and how the purposes and principles of the United Nations have been or are being eroded; what incremental norms and practices have been frustrating the realization of the goals of the United Nations. For this mandate, the rigorous respect of Articles 1 and 2 of the Charter is of paramount importance, bearing in mind that certain events and practices of the

²¹ Eduardo Galeano, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (Monthly Review Press, 1997). Cf. case law of the Human Rights Committee on indigenous matters, e.g., *Ominayak, Chief of the Lubicon Lake Band, v. Canada*: "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [of the International Covenant on Civil and Political Rights] so long as they continue." (A/45/40, vol. II, annex IX.A, para. 33); Möller and de Zayas, p. 447. Nancy Fraser, "Egalité, identités et justice sociale", *Le Monde diplomatique*, June 2012, p. 3.

²² Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 1998).

²³ A. de Zayas "Normes morales et normes juridiques: Concurrence ou conciliation" in A. Millet-Devalle, ed., *Religions et droit international humanitaire* (Paris, Pedone, 2008), pp. 81-87 and *Handbook of Social Justice in Education*, William Ayers, ed. (Routledge, 2008). Cf. the analysis of "democracy" and "value" in China by Harro von Senger, "'Wert' in China", in *Value: Sources and Readings on a Key Concept of the Globalized World*, Ivo de Gennaro, ed. (Leiden, 2012), pp. 399-414.

recent past have brought the relevance of the United Nations into question. It is for the General Assembly to exercise its responsibility towards the world and reclaim leadership in asserting the values that underlie the Charter, first and foremost the imperative to work untiringly to prevent any kind of armed conflict, to end ongoing wars, to rebuild the peace and to maintain it.

V. Good practices and promising trends

59. At the present stage, the Independent Expert has not yet developed benchmarks to assess, measure and compare what qualitatively could be considered "best practices". He will further consult stakeholders in this respect.

60. As a democratic international order demands well-functioning inter-action between the democratic will of peoples and the concrete policies that affect them, an equitable international order requires a correlation between production and wealth, performance and reward, and rejects the excesses of the uncontrolled financial markets that more than once have adversely impacted the world economy, causing hardships such as unemployment and loss of the savings and pensions of millions of people. In the light of the persistence of extreme poverty in the world, including in developed countries, exorbitant salaries and bonuses as well as currency speculation constitute unethical practices. Efforts in many countries to regulate the financial markets are commendable but risk remaining insufficient.

61. Any progress in the fields of codification, monitoring and enforcement of human rights is welcome, even if achieved by homeopathic doses. In her report on the strengthening of the human rights treaty bodies (see A/66/860), the High Commissioner for Human Rights welcomed increased ratification of the core human rights treaties. The goal is universal ratification, accompanied by education so that greater awareness of human rights permeates Government and society in a sustainable manner.

62. With respect to a democratic international order, the Independent Expert values the progress achieved in the empowerment of women in many countries, the greater transparency shown in elections and the added value of election monitoring by many actors. As stated earlier, a democratic international order is best secured by a growing universal acceptance of democratic principles as reflected in a growing number of democratic States and by the constant improvement of democratic institutions. Democracy also requires an informed population that can articulate its wishes and can choose among policies in periodic elections and by referendums. A democratic international order requires greater transparency and respect for the needs and aspirations of peoples in all regions of the world, regardless of economic power or geopolitical strategic importance, giving due regard to national sovereignty and the right of self-determination.

63. The Independent Expert is studying the democratic traditions of many countries and practices of popular initiatives, referendums, recall and impeachment.

He intends to explore the feasibility of using aspects of the "direct democracy"²⁴ model more broadly, which would give populations opportunity to choose among policies and not only candidates. It should be remembered that the right to vote is not identical with the right to choose. The pros and cons of giving civil society the right to initiate legislation by petition, which could be put to a general vote if a certain number of signatures are gathered, and the possibility of referendums on legislation being considered or already adopted will be explored. Combining aspects of direct democracy and representative democracy would perhaps prove to be appropriate for some countries.

64. Among practices to be studied are enhanced press freedom, access to the Internet worldwide, regular elections and election monitoring. Current developments in the social media may contribute insights. At the fall 2011 session of the United Nations Chief Executives Board for Coordination, the High Commissioner for Human Rights said in her statement, entitled "The Tunis imperative", that "human rights, democracy and the rule of law are as much a part of the UN brand as peacekeeping and development assistance". Before the Human Rights Council at its nineteenth session, she said:

Much of this historic period has been marked by public demands of people to live a life of dignity and enjoyment of human rights. Although most striking in several countries of the Arab region where we have seen tens of thousands of women, men and young people take to the streets to voice their claims, popular movements denouncing exclusion, inequality, discrimination, absence of genuine political participation and lack of economic and social rights have emerged on all continents, as people have shown themselves unwilling to accept impunity and lack of accountability for the actions of Governments, international institutions and the transnational and national private sectors. People are demanding freedom: freedom from fear, and freedom from want. They are demanding respect of the rule of law — including in the economic sphere — and full participation in decisions that affect their lives.

65. With regard to an international order that shall be more equitable, the Independent Expert commends those countries that have met their commitments under the United Nations Millennium Declaration, in particular the Millennium Development Goals, as well as progress achieved in technology transfer and access to medical services and drugs. Foreign investment is necessary in developing countries, provided that the profits therefrom are equitably shared. Praiseworthy too is the growing consciousness that the products we buy at the grocery store or elsewhere should come from equitable production and trade, as illustrated by the growing popularity of fair trade coffee, flowers and other products.

66. Women's peace movements have raised major issues on war and conflict situations. Without doubt, these movements to wage peace have made historical inroads in impacting public opinion and are reflected in Security Council resolutions

²⁴ Johannes Reich, "An Interactional Model of Direct Democracy — Lessons from the Swiss Experience", 5 June 2008. Available at: <http://ssrn.com/abstract=1154019>; *Deliberative Democracy*, Jon Elster, ed. (Cambridge University Press, 1998); Carne Ross, *The Leaderless Revolution: How Ordinary People Will Take Power and Change Politics in the 21st Century* (Blue Rider Press, 2012); Takis Fotopoulos, *Towards an Inclusive Democracy: The Crisis of the Growth Economy and the Need for a New Liberatory Project* (Continuum, 1998).

1325 (2000), 1820 (2008), 1888 (2009) and 1889 (2009), bringing a gender perspective into peace negotiations.

67. The Independent Expert is aware of State and private-sector programmes of cultural cooperation and mutual improvement of school textbooks and curricula, and has himself participated in such efforts. Textbooks should mainstream human rights and democratic values and eliminate stereotypes.

68. Among good practices in the United Nations system the Independent Expert will study the successes of OHCHR in providing advisory services and technical assistance to countries in transition to democracy, and the operation of the ILO tripartite system in achieving more equitable labour conditions worldwide. At the United Nations Conference on Sustainable Development (Rio+20), the participating States committed themselves to a "green economy", adopting an outcome document, "The future we want", aiming at sustainable development.

69. The Independent Expert will study the fruits of the universal periodic review, which is one step towards achieving an international democratic order through dialogue among stakeholders. The Governments-United Nations-civil society triangle should be further developed. Without a doubt, individuals and peoples have emerged as interlocutors of Governments and agencies. As Theo van Boven emphasized, "people matter".²⁵

VI. Moving forward

70. A preliminary report cannot advance conclusions or formulate recommendations. These are but working hypotheses that must still be tested in the course of the coming years. The Independent Expert looks forward to receiving and analysing feedback from stakeholders, think tanks and universities. He recognizes that in order to advance in the realization of an international order that is more democratic and more equitable, a change in prevailing ways of thinking and behaviour is necessary; a semantic reformation may even be undertaken, since words are powerful weapons that often perpetuate prejudice and injustice. Moreover, positivism must be tempered by anthropological, social and cultural considerations. Building a culture of equity requires recognition that we all have the same human dignity and rights, i.e., that privileges must be phased out. Although equity is common sense, based on the conviction that we all share an aspiration to happiness, education is necessary to unlearn privilege, unlearn exclusion, unlearn discrimination, unlearn prejudice, unlearn war. This is possible, as the work of UNESCO demonstrates. A new human rights paradigm should replace the artificial division of human rights into first, second and third generation rights, with its inherent value judgement that is both obsolete and misleading. A new paradigm of rights could be envisioned: enabling rights (peace, food, homeland, development), immanent rights (equality, due process) and end rights (identity, the right to achieve one's potential). The time is ripe for this change of perspective about rights. It must be accepted that the essence of a "right" is not merely its formal codification in legislation, nor its justiciability, i.e., whether it

²⁵ T. van Boven, *People Matter: Views on International Human Rights Policy* (Amsterdam, Meulenhoff, 1982).

can readily be claimed before a judge, but rather whether there is an objective justification for that right; whether public policy (*ordre public*) requires it. While many of the so-called third-generation rights (peace, a clean environment) are more difficult to render justiciable, they are nonetheless essential entitlements of the human being. Therefore, the test must be whether the right emanates from the higher concept of human dignity, i.e., whether it is inherent in or serves human dignity. Only then does the pragmatic issue arise of how to put that right into law and practice; how it can be concretely implemented by legislation or regulations.

71. The Independent Expert encourages the open-ended working group of the Human Rights Council to advance towards the adoption of a declaration on the human right to peace so that the General Assembly can proclaim it. It is crucial to reaffirm the continued validity of the Charter of the United Nations and the illegality of sabre-rattling and other threats or use of force.

72. With regard to an international order that should be more democratic, the Independent Expert is aware of the frequent disconnect between people and Government and the dysfunctions prevalent in many countries, both in Government and within civil society itself. States and civil societies are invited to review the degree of correlation between the will of the people and the policies actually implemented. A responsible electorate should enjoy the opportunity to peacefully articulate approval or disapproval of Government policies, without intimidation or fear. Independent national human rights institutions, or other non-governmental agencies, could undertake the task of measuring the level of correlation through periodic polling and make corrective recommendations to parliaments. On the global scale, an appropriate organization or agency could "take the temperature" of world public opinion. Supplementing the General Assembly, which is composed of Government representatives, other mechanisms could be devised to allow civil society in all countries to articulate their views, which in some cases may differ from those expressed in the Assembly by Government representatives. Moreover, the feasibility of global public opinion polling, through the Internet or an aggregate societal platform, on issues such as peace, the environment and the common heritage of mankind should be explored. Such opinion polls would not have binding force, but would facilitate a better overview of popular will in all regions of the world.

73. With regard to a more equitable international order, the economic dynamics that make the rich richer and the poor poorer must be changed. This may entail, among other things, the cancelling of the debts of many developing countries. The Bretton Woods institutions have paramount responsibility in this regard.

74. Bearing in mind that "the market" is not an invention of capitalism but that it has existed for thousands of years in many different societies, social justice logically requires that the profits resulting from the operation of markets and infrastructures created by society be equitably shared within societies and in a larger context within the human family. In order to achieve equity, other measures of affirmative action must be considered. National human rights institutions could perhaps make pertinent proposals. Governments are thus invited to consider what strategies could be most

conducive to progress, and civil society should help their Government devise such strategies. Ultimately, this is in the interest of all peoples in all countries.

75. On 14 May 2012, the special procedures mandates on extreme poverty, food, transnational corporations and other business enterprises, foreign debt and international solidarity proposed the imposition of a global financial transaction tax aimed at offsetting the costs of the enduring economic, financial, fuel, climate and food crises and to protect basic human rights.²⁶ Moreover, a special tax on all sales of military aircraft, navy vessels, cruise missiles and other weapons could be considered. Progress on disarmament negotiations is always welcome. Lip service to disarmament is insufficient; the goal is to find ways to redirect the resources used for the military and reduce the danger of war while liberating funds to finance development and all-inclusive growth.

76. Advisory services and technical assistance may be necessary to assist States in drafting legislation and implementation mechanisms to promote democracy and equity in their own societies. The Office of the High Commissioner for Human Rights can assist countries in the drafting of laws and enabling legislation so as to ensure the enforcement and follow-up of international commitments, including decisions of international courts and tribunals. Moreover, the establishment of a world court on human rights could be envisaged,²⁷ a project much discussed in the context of the sixtieth anniversary of the Universal Declaration of Human Rights²⁸ and endorsed by the Government of Switzerland in its initiative "An agenda for human rights".

77. Regional economic cooperation through, for example, the Association of Southeast Asian Nations, the African Union, the European Union, the Organization of American States, the Community of Latin American and Caribbean States, as well as subregional initiatives such as the Common Market of the South (MERCOSUR) or the Union of South American Nations (UNASUR), should be enhanced, with the support of regional human rights institutions. Moreover, the proactive participation of world religions and philosophies in promoting an international order that is more democratic and equitable should be encouraged. Vast human resources of goodwill, optimism, enthusiasm and belief in the future must be tapped.

²⁶ www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E.

²⁷ See, for example, the written statement submitted by the International Society for Human Rights to the Human Rights Council on an international bill of rights and world court of human rights (A/HRC/19/NGO/124); the website of the International Bill of Rights Association (www.internationalbillofrights.org); J. Kirk Boyd, 2048: *Humanity's Agreement to Live Together* (Berkeley, California, Berrett-Koehler Publishers, 2011); Manfred Nowak, "The Need for a World Court of Human Rights", *Human Rights Law Review*, vol. 7, No. 1 (2007), pp. 251-259.

²⁸ Julia Kozma, Manfred Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Vienna, Neuer Wissenschaftlicher Verlag, 2010). In November 2009, a conference on this issue was hosted at the Law School of the University of California at Berkeley with the participation of the first United Nations High Commissioner for Human Rights, José Ayala-Lasso, the former Acting High Commissioner for Human Rights, Bertrand Ramcharan, Manfred Nowak, Ted Meron, David Caron, Kirk Boyd, Bruna Molina, Alfred de Zayas and many academics and members of civil society. Several follow-up side events have also been held at the sessions of the Human Rights Council. See www.internationalbillofrights.com.

78. As all human rights derive from human dignity, it is important to recognize that human dignity is not a product of positivism but an expression of natural law and human rationality. Although an abstract concept, human dignity has engendered concrete norms of human rights, a practical *mode d'emploi* strengthened by enforcement mechanisms. Whereas this mandate may also appear abstract, it aims at formulating a pragmatic *mode d'emploi* to overcome and remedy obstacles. Bearing in mind that the authority of the United Nations has been and is being challenged, it is important to reaffirm the purposes and principles of the Charter and the role of the General Assembly as the pre-eminent forum to negotiate and build a democratic and equitable international order and ensure social and people-centred sustainable development, giving greater voice to civil societies around the planet.

79. Governments and civil society can best advance a democratic and equitable international order by acknowledging that the Charter of the United Nations is the world constitution, based on a vision of justice and human dignity. A better world is indeed possible if all honour that constitution, defend it and, where necessary, undertake constructive reform to address today's needs and give concrete application to its purposes and principles in larger freedom.



General Assembly

Distr.: General
9 August 2012

Original: English

Sixty-seventh session

Item 70 (c) of the provisional agenda*

**Promotion and protection of human rights: human rights
situations and reports of special rapporteurs and representatives**

Extreme poverty and human rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, submitted in accordance with Human Rights Council resolution 17/13.

* A/67/150.



Report of the Special Rapporteur on extreme poverty and human rights

Summary

In the present report, the Special Rapporteur on extreme poverty and human rights analyses the obstacles to access to justice for persons living in poverty. Access to justice is a fundamental right in itself and essential for the protection and promotion of all other civil, cultural, economic, political and social rights. Without effective and affordable access to justice, persons living in poverty are denied the opportunity to claim their rights or challenge crimes, abuses or human rights violations committed against them. The Special Rapporteur emphasizes that improving access to justice for persons living in poverty requires tackling a range of legal and extralegal obstacles present both within and outside of the formal justice system, including social, economic and structural obstacles.

Contents

	<i>Page</i>
I. Introduction	3
II. Normative framework	3
III. Obstacles which impede persons living in poverty from accessing justice	6
A. Social and cultural barriers	7
B. Legal and normative barriers	8
C. Institutional and structural obstacles in the justice chain	10
D. Non-existent or inadequate legal assistance	14
E. Structural problems of judicial processes	16
F. Challenges in ensuring human rights are upheld in informal justice systems	19
IV. Conclusions and recommendations	20

I. Introduction

1. Since the submission of her previous report to the General Assembly (A/66/265), the Special Rapporteur submitted her annual report to the Human Rights Council at its twentieth session (A/HRC/20/25), which was devoted to following up the recommendations made in country mission reports. She also submitted reports on her official visits to Timor-Leste (A/HRC/20/25/Add.1) and Paraguay (A/HRC/20/25/Add.2).
2. In addition, pursuant to Human Rights Council resolution 12/7, the Special Rapporteur submitted the final draft of her report on the right to adequate housing and human rights to the Council at its twentieth session.
3. During the past year, the Special Rapporteur continued to work on her mandate and held working sessions with the United Nations Development Programme, the World Bank, academic institutions and civil society organizations. She also met with people living in poverty. A full list of her activities is provided in the annex to her report to the Human Rights Council, as well as being available on the website of the mandate.¹

II. Normative framework

4. The indivisibility, interdependence and interrelatedness of human rights is often recalled and reiterated in human rights instruments and by human rights bodies, although frequently disregarded in practice. The interdependence of all human rights is unequivocal when considering the situation of persons living in poverty, which is both a cause and a consequence of a range of mutually reinforcing human rights violations. Eradicating extreme poverty not only requires improving access to housing, food, education, health services, water and sanitation, but also requires ensuring that persons living in poverty have the resources, capabilities, choices, security and power necessary to enjoy the whole spectrum of human rights.
5. Access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability, for several reasons. First, owing to their vulnerability, persons living in poverty are more likely to fall victim to criminal or illegal acts, including sexual or economic exploitation, violence, torture and murder. Crime and illegality are also likely to have a great impact on their lives as it is hard for them to obtain redress and as a result they may fall further into poverty. Second, access to justice is important because justice systems can be tools to overcome deprivation, for example, by developing jurisprudence on social and economic rights. Third, when vulnerable persons cannot access justice systems, they are sometimes forced to take justice into their own hands through illegal or violent means, or to accept unjust settlements. Thus, fair and effective justice systems are an important way to tackle impunity and reduce violence and conflict.² Fourth, the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights. In turn, their increased vulnerability and

¹ www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx.

² *Programming for Justice: Access for All* (Bangkok, United Nations Development Programme, 2005), p. 3.

exclusion further hamper their ability to use justice systems. This vicious circle impairs the enjoyment of several human rights.

6. Persons living in poverty have a right to access justice without discrimination of any kind, and a right to due process, understood as the right to be treated fairly, efficiently and effectively throughout the justice chain.³ States have assumed obligations in that regard, by committing themselves to respect, protect and fulfil several rights such as the right to an effective remedy (e.g., Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2.3; Convention on the Elimination of All Forms of Racial Discrimination, art. 2; Convention against Torture, arts. 13 and 14); the right to equality before the law (e.g., Universal Declaration of Human Rights, art. 1; International Covenant on Civil and Political Rights, art. 14.3 (a)-(d)); and the right to a fair trial (e.g., Universal Declaration of Human Rights, art. 10; International Covenant on Civil and Political Rights, art. 14.3 (b)-(d); and the right to seek and receive information (e.g., Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 26).

7. In addition, several other rights are also relevant, such as to enjoy rights without discrimination (e.g., Universal Declaration of Human Rights, art. 2; International Covenant on Civil and Political Rights, art. 2; International Covenant on Economic, Social and Cultural Rights, art. 2); the right to recognition as a person before the law (e.g., Universal Declaration of Human Rights, art. 6; International Covenant on Civil and Political Rights, art. 16; Convention on the Elimination of All Forms of Discrimination against Women, art. 15; Convention on the Rights of Persons with Disabilities, art. 12); and the right to seek and receive information (e.g., International Covenant on Civil and Political Rights, art. 19.2).⁴

8. The right to an effective remedy is a key element of human rights protection and serves as a procedural means to ensure that individuals can enforce their rights and obtain redress. The lack of effective remedies for violations of human rights such as discrimination is still a pressing reality in many jurisdictions, as is the lack of judicial protection for economic, social and cultural rights. However, this concept entails more than improving access to judicial and adjudicatory mechanisms. It also implies that remedies must be effective and legal, and that judicial outcomes must be just and equitable. The right to an effective remedy also includes reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

9. The right to equality before the courts and tribunals and the right to a fair trial consist of a complex set of rules and practices that include the right to a fair and public hearing within a reasonable time and respect of the principles of equality of

³ The justice chain is the series of steps that a person has to make to access justice through the formal justice system or to claim their rights. The chain is complex and differs according to the case, the context and the type of legal system in place. It includes filing a claim, contact with the police, investigation, arrest/summons/bail, prosecution, court appearances and mediation/adjudication. UN-Women, *2011-2012 Progress of the World's Women: in Pursuit of Justice* (2011), p. 48 (hereafter UN-Women Report 2011-2012).

⁴ Various international human rights instruments specifically include the issue of access to justice for particular groups, for example, the Convention on the Rights of Persons with Disabilities (art. 13) and the Declaration on the Rights of Indigenous Peoples (arts. 5 and 40). Although groups that suffer from discrimination are overrepresented among the poor, the present report does not address their particular challenges, in favour of taking a broader view.

arms and presumption of innocence, among others. While the rules regarding due process are included in several provisions of international human rights treaties, of particular relevance is article 14 of the International Covenant on Civil and Political Rights, which provides that "all persons shall be equal before the courts and tribunals" in criminal and civil cases⁵ and creates an obligation upon States to ensure that everyone has access to "a fair and public hearing by a competent, independent and impartial tribunal established by law" in "the determination of any criminal charge against him or her or of his or her rights and obligations in a suit at law".

10. These principles require that States take effective measures to ensure that all persons have equal access to judicial and administrative mechanisms for the redress of grievances, without discrimination on the basis of race, ethnicity, sex, age, disability, social status, or other grounds. States must also ensure that these mechanisms are substantively non-discriminatory, including measures to eliminate conditions which cause or help to perpetuate discrimination.⁶ In many instances, laws, policies and procedures may indirectly discriminate against, or have a disproportionate impact upon, persons living in poverty. In addition, various extralegal factors also limit or obstruct their de facto access to justice.

11. Thus, States have an obligation to construct a legal and institutional framework which facilitates access to independent and effective judicial and adjudicatory mechanisms and ensures a fair outcome for those seeking redress, without discrimination of any kind. However, guaranteeing de jure access to judicial and adjudicatory mechanisms is not sufficient to ensure that all individuals have de facto access to justice. States must also take positive measures to ensure laws and policies are substantively non-discriminatory, including measures to eliminate conditions which cause or help to perpetuate discrimination.⁷ In many instances, laws, policies and procedures may indirectly discriminate against, or have a disproportionate impact upon, persons living in poverty. In addition, various extralegal factors also limit or obstruct their de facto access to justice.

12. To ensure that the poor have de facto enjoyment of the rights to an effective remedy, equality before the courts and a fair trial, States must take effective measures to remove any regulatory, social or economic obstacles that impede or hamper persons living in poverty from accessing remedies and securing a fair and equitable outcome in any judicial or adjudicatory process. This includes removing obstacles imposed by the unequal economic or social status of those seeking redress, taking into account the principles of equality before the courts and equality of arms, which are integral parts of due process.⁸

13. These principles require that claimants or defendants must be able to exercise their rights and defend their interests effectively and in full procedural equality with other parties. When there is a big disparity in the economic or social status of litigants, as is often the case when those living in poverty seek redress for grievances against more powerful parties, there is a high risk of an unequal trial. For example, this is likely when impoverished workers want to bring a case against their

⁵ Human Rights Committee, General Comment No. 32, para. 13.

⁶ Human Rights Committee, General Comment No. 32, para. 9, and Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 35. Economic and social status is explicitly included as a ground of discrimination in the American Convention on Human Rights (art. 1).

⁷ CCPR/C/GC/18, para. 9, and E/C.12/GC/20, para. 8.

⁸ Human Rights Committee, General Comment No. 32.

employer for unfair and unjust working conditions or when a woman without personal income or resources brings a case against her partner for domestic violence. Procedural inequality can also arise in litigation against the State.

14. The existence of significant socioeconomic inequality between the parties in a proceeding requires States to adopt all necessary measures to help to reduce or eliminate the deficiencies that impair or diminish the effective protection of the rights at stake. If such measures are not taken, those who are socially or economically disadvantaged do not enjoy a real opportunity for justice or the benefits of due process of law in an equal manner. These obligations arise in civil and criminal cases and in pretrial stages of the justice chain, when the rights of persons living in poverty are also at stake.

15. Even in the most developed countries, legal disempowerment is rife and persons living in poverty do not have full de jure or de facto access to justice. Around the world, persons living in poverty face a range of obstacles in claiming and enforcing, or contesting violations of, their rights. Such obstacles not only imply violations of their rights to a remedy and due process, but also undermine their ability to enjoy other human rights equally and without discrimination. States, therefore, are under an obligation to eliminate obstacles which frustrate the efforts of the poorest and most vulnerable to access justice. Effective enforcement of and compliance with judicial rulings in favour of persons living in poverty are also essential to ensure that persons living in poverty can benefit from the law.

16. The Special Rapporteur chose to focus the present report on obstacles to access to justice, because overcoming such obstacles is fundamental to improving the situation of the poorest and most vulnerable, and empowering them to claim their rights. The report is based on the understanding that meaningful access to justice for persons living in poverty does not depend only on legal tools or access to legal services, lawyers and courts, but also requires a more comprehensive and holistic approach that takes into account broader structural, social and economic factors.

III. Obstacles which impede persons living in poverty from accessing justice

17. Some of the obstacles that persons living in poverty face, such as the cost of legal advice, administrative fees and other collateral costs, relate directly to their lack of financial resources. Other obstacles, including lack of access to information and lack of legal recognition arise out of discrimination against the poorest and most marginalized. Furthermore, institutional and structural obstacles are found in the design and operation of justice systems; these include the inadequate capacity and resources of courts, the police and prosecution corps, the corrupt practices therein, and the location of courts and police stations. Poor functioning of the justice system particularly affects the poor, because pursuing justice requires a much greater effort and investment in terms of money and time for them, while their chances of a just and favourable outcome are worse. The deprivations that persons living in poverty encounter throughout their lives — lack of access to quality education, reduced access to information, limited political voice and social capital — translate into lower levels of legal literacy and awareness of their rights, creating social obstacles to seeking redress.

18. Certain groups that suffer from structural discrimination and exclusion and are disproportionately represented among the poor, particularly ethnic and racial minorities, migrants and indigenous peoples, encounter additional barriers to accessing justice. Those difficulties are multiplied for women living in poverty, who experience compounded discrimination and disempowerment, not to mention financial constraints. Therefore, across different contexts, women living in poverty experience particular difficulties in accessing justice mechanisms and winning judicial recognition, action and enforcement for crimes, discrimination and human rights violations they are disproportionately subject to. Children are often denied the due process guarantees that they are entitled to on the same basis as adults, as well as additional protections that are necessary, in particular when they are particularly deprived or marginalized.

19. Thus, persons living in poverty face significant barriers that seriously impede or discourage them from seeking justice. Those barriers include the following.

A. Social and cultural barriers

20. Owing to deep asymmetries of power, the stigma and discrimination they suffer and their socioeconomic disadvantages, persons living in poverty often reasonably decide against bringing a case to court, thereby precluding any possibility of obtaining justice.

Fear of reprisal and mistrust of the justice system

21. Persons living in poverty may choose not to seek justice because they fear reprisal or sanction from more powerful actors within or outside their community, or fear being stigmatized or discriminated against. Having experienced discrimination and abuse at the hands of the police and other authorities throughout their lives, people living in poverty are often averse to relying upon formal legal processes for fear of being subject to further exploitation or corruption, or of receiving an unjust outcome. Certain groups, such as ethnic minorities, indigenous peoples or irregular migrants, may be reluctant to engage with the justice system owing to concerns relating to the respect of their own values or owing to their immigration status.

22. Women living in poverty often face particularly strong social barriers to pursuing cases. In some contexts, there are strong cultural norms against women speaking on their own behalf in disputes.⁹ Social sanction is a particular obstacle for women who are victims of domestic or sexual violence. In the case of gender-based violence, for example, social constraints account partly for the disproportionately high underreporting and attrition rates.¹⁰

Socioeconomic subordination

23. Another social barrier relates to the powerlessness and dependence of persons living in poverty or their subordination to other groups or persons. For example, in some societies, poor women may be unable to approach justice systems without the assistance of a male relative, while in very hierarchical societies those who are

⁹ UN-Women Report, 2011-2012, p. 52.

¹⁰ Ibid., p. 51.

economically dependent on other groups are unlikely to pursue justice claims against them.

Lack of empowerment and access to information

24. Awareness and understanding of the existence of legal rights, and of the ways in which such rights can be invoked before and enforced by judicial and adjudicatory mechanisms, is fundamental to enjoying the full range of civil, cultural, economic, political and social rights, and for remedying violations thereof.

25. Persons living in poverty are often deprived from a young age of the opportunity to acquire the tools, social capital and basic legal knowledge necessary to engage with the justice system. They are unaware of the existence and contents of their legal rights and entitlements, of the State's obligations and duties towards them, and of how to secure the assistance they need. This is especially the case for those who experience discrimination in accessing education on grounds such as ethnicity, gender or disability.

26. States not only have an obligation to ensure the enjoyment of the right to education, including human rights education (International Covenant on Economic, Social and Cultural Rights, art. 13) but also an obligation to ensure access to information without discrimination (International Covenant on Civil and Political Rights, arts. 2 and 19), which implies an obligation to proactively put information of public interest in the public domain and to ensure easy, prompt, effective and practical access to such information for all persons.¹¹ In the context of access to justice, this requires, for example, that States proactively inform the public about new or changing laws, and make legal materials, such as laws, judgements, trial transcripts and adjudication procedures, available and reasonably accessible.

27. Simply making information available is not sufficient. The burdens involved in accessing information, such as travel costs, fees, long waiting periods, and interaction with State officials, can act as disincentives for the poorest. States often do not take into account the difficulties, such as financial, geographical, technological or linguistic barriers, that the poor face in accessing information. For example, in many States, information about new statutes is disseminated in a very limited way, or access to copies of enacted laws is conditional upon the payment of a fee.¹² Information may only be available in written format, thus creating obstacles for those with low levels of literacy and persons with disabilities, or may only be published online or in commercial newspapers, or only in one official language.

B. Legal and normative barriers

Inadequate legal framework and normative protection

28. Laws tend to reflect and reinforce the privileges and interests of the powerful. Thus, many laws are inherently biased against persons living in poverty, do not recognize or prioritize the abuses they regularly suffer, or have a disproportionately harsh impact on them. A legal system based on prejudices against the poor does not

¹¹ Human Rights Committee, General Comment No. 34, para. 19.

¹² *Making the Law Work for Everyone*, Vol. II (New York, Commission on the Legal Empowerment of the Poor and United Nations Development Programme, 2008), p. 19.

protect them, but rather undermines their rights and autonomy, or seeks to control, criminalize and segregate them. Legislators often do not recognize and estimate the issues that negatively affect persons living in poverty as serious and in need of active remedy.

29. For example, in many legal systems, economic, social and cultural rights are not sufficiently protected, and discrimination on the grounds of socioeconomic situation is not recognized. Similarly, issues such as abuses in the informal employment sector or the exploitation of tenants by landlords, all of which disproportionately affect persons living in poverty, are often not legislated against in an effective manner. Meanwhile, actions which are undertaken by persons living in poverty out of necessity, such as sleeping in public spaces or street vending, are criminalized. Hence, reforms aimed at improving access to justice by the poor must not neglect the need to modify or repeal certain laws or strengthen others.

30. Women living in poverty suffer compounded obstacles to accessing justice generated by inadequate legal frameworks and normative protection, because the deprivations and abuse that women suffer as women are often not recognized in law. Many States lack legal and constitutional frameworks that guarantee women the enjoyment of their rights, such as anti-discrimination laws. Issues such as domestic violence, sexual violence, reproductive rights, and equal pay and inheritance rights are not adequately addressed in many legal regimes, thus curtailing any possibility of seeking remedies. This has a particularly devastating impact on poor women, who are often left without any formal or informal recourse.

Lack of judicial review for social policies

31. Often, there is no mechanism in place to review social policies or administrative decisions that have a major impact on the enjoyment of the rights by persons living in poverty. The lack of remedies for the negative impacts of social policy in the areas of health, housing, education and social security, or for administrative decisions relating to welfare benefits or asylum proceedings, often results in inability to seek redress in cases of violations of key human rights, such as the right to equality and non-discrimination and the right to social security. This is a major obstacle to accessing justice for persons living in poverty, who are disproportionately affected by those policies.

32. The lack of judicial review or complaints mechanisms for social policy, compounded by a lack of justiciability of economic, social and cultural rights at the domestic level, creates the perception that social policy is a charitable measure rather than part of an obligation to ensure the enjoyment of human rights. The recognition of rights imposes the obligation to establish judicial or other remedies that enable rights holders to invoke their protection in courts, or before other similarly independent bodies, when they are infringed. The lack of adequate and effective remedies for violations of economic, social and cultural rights is thus an infringement of international human rights instruments.

Lack of legal identity

33. The right to be recognized as a person before the law is a fundamental human right (International Covenant on Civil and Political Rights, art. 16, and Convention on the Rights of the Child, art. 7), and is at the core of the right to access justice. Many persons living in poverty are de facto deprived of accessing courts and other

public services as they lack legal identity. With more than 50 million births going unregistered every year,¹³ the lack of formal registration is a considerable barrier to legal recognition before the law, which has a disproportionate impact on the poorest and most marginalized. Without recognition, individuals are unable to access social services or to access courts to seek remedies for violations of their human rights.

34. Persons living in poverty face greater and disproportionate barriers and disincentives in accessing registration services, which are often geographically distant for them, time-consuming and unaffordable. The travel costs to access registration services are added to relatively high fees charged for the issuance of identity documents and to the working time lost. These costs are more burdensome for the poor.

C. Institutional and structural obstacles in the justice chain

35. Persons living in poverty face obstacles in each of the steps that they must take to seek redress through the formal justice system.

Location and physical accessibility

36. As the majority of the world's poor live outside of urban centres, with many of the most marginalized living in remote, hard-to-reach areas, the lack of nearby police centres and the centralization of national justice systems constitute serious obstacles to their accessing justice.

37. While police deployment can be problematic when communities living in poverty are disproportionately targeted, the absence of police and other institutions necessary for the administration of justice in rural, poor and marginalized areas is a common problem. Courthouses, particularly appeal courts, are often located only in capital cities or large towns. Police officers, prosecutors and lawyers are also concentrated in urban areas, along with registries for land titling and for births, deaths and marriages. In such circumstances, persons living in poverty often have to travel long distances at great cost to engage with the justice system, exposing themselves to unfamiliar environments and unsafe conditions.

38. Such factors often act as a persuasive deterrent against seeking redress from judicial or adjudicatory mechanisms, or may indeed represent an insurmountable obstacle for the poorest and most marginalized. This is especially so for those who have limited mobility, such as older persons or persons with disabilities, or those for whom travel is more difficult or dangerous, including women and children.

39. The geographical remoteness of justice mechanisms for persons living in poverty can also exacerbate their situation and lead to violation of other human rights. Those without easy and immediate access to law enforcement officials are unable to seek immediate redress or protection from violence, abuse and exploitation, and will have greater difficulty in contesting land issues and forced evictions. The police may be less likely to pursue complaints if they have to travel long distances to do so, particularly where resources are scarce.

¹³ United Nations Children's Fund (UNICEF), information available at www.unicef.org/factoftheweek/index_53718.html.

40. Persons living in poverty, particularly those with disabilities or older persons, may experience additional obstacles in accessing justice when courts and police stations are not appropriately designed, and when court processes are not adaptable. For example, many judicial systems are heavily reliant on paper forms and written submissions, and on the presentation of oral evidence. Often, police stations and courts are not wheelchair accessible. Where measures are not in place to enable judicial bodies to adapt their processes for those in need, including by providing aid to defendants, claimants, witnesses and jurors who require it, such persons are excluded from accessing and benefiting from the justice system.

Inadequate capacity and resources

41. Shortfalls in financial and human resource allocations to courts, the police and prosecution corps, and insufficient training and capacity-building for judicial and law enforcement officers translate into failures in the judicial system which infringe upon access to justice. Such failures, including delays (see paras. 68-69 below), flawed or insufficient evidence-gathering, lack of enforcement, and abuse, undermine the effective functioning of judicial and adjudicatory mechanisms and have a disproportionate impact on and undermine the human rights of persons living in poverty.

42. When judicial systems receive inadequate financial and human resource allocations from State budgets, police stations, prosecution corps and courthouses are understaffed and poorly equipped, and benches are deprived of adequate numbers of judges. The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the most disadvantaged, whose cases are usually underprioritized. Again, this frequently has an especially harsh impact on women, as often the criminal justice and legal system lacks capacity to ensure a swift, fair and gender-sensitive approach.

43. Non-registration of complaints by the police is a practice common in overburdened and underresourced criminal justice systems. In such cases, it is usually the complaints of persons living in poverty that go unregistered, owing to bias and discrimination, and their disempowerment and lack of knowledge and information about their rights. Cases involving gender-based violence, notably rape allegations, often go unregistered, particularly when the victim is a woman living in poverty and lacks awareness or the means to pressure the police to investigate.

44. The rights and interests of women are thus especially compromised by badly resourced and trained judicial systems and police forces, State organs that traditionally reflect and prioritize the interests of men and are dominated by men. Not only do women living in poverty come up against stark power imbalances and discriminatory cultural norms and other social structures when instituting legal proceedings, they are also disadvantaged by the lack of training afforded to officials on the application of laws relating to gender-based violence and the proper treatment of victims and handling of complaints. Women living in poverty have even less power and capacity to challenge this state of affairs.

Stigma and lack of understanding of the needs of the poor

45. Often, police officers, court staff and other justice sector personnel reflect the discriminatory attitudes of the wider society and are not adequately trained to perform their roles without discrimination or bias against persons living in poverty.

46. The background and daily experience of justice sector staff, especially judges, are often very different from those of persons living in poverty, and this often means that, without proper training and sensitization, they do not understand and value their views, choices, behaviours or problems. Persons living in poverty may be denied access to impartial justice owing to negative stigma and stereotyping from judges, prosecutors and police.

47. Police forces are the primary and most common interface with the justice system for persons living in poverty. All too often, however, police actions and procedures act as a barrier to meaningful access to justice for persons living in poverty and they are treated as potential criminals, rather than as rights-holders whose access to justice must be supported and facilitated.

Excessive and arbitrary use of detention and incarceration

48. Across developing and developed countries, incarceration rates are extremely high for persons living in poverty. Disproportionately high numbers of them are arrested, detained and imprisoned as a result of law enforcement officials' frequent use of poverty, homelessness or disadvantage as an indicator of criminality, and they encounter considerable obstacles in manoeuvring within or exiting the criminal justice system.

49. The provision of bail pending trial is often subject to stringent and onerous conditions. In the vast majority of cases, those requirements are impossible to meet for the poorest. Therefore, they are more likely to remain in detention pending trial. This dramatically increases the likelihood that they will ultimately be convicted: not only does it put them in a vulnerable position, in which they will be more inclined to accept unfair "plea deals" or to make admissions of guilt in order to secure a swifter release, it also impedes their ability to liaise with lawyers or obtain character witnesses, and causes them to lose their employment or social housing, thereby creating a disincentive for the court to give a suspended or community sentence.¹⁴

50. The economic and social costs of detention and incarceration can be devastating for persons living in poverty. Detention and incarceration can lead to loss of income and employment and often temporary or permanent withdrawal of social benefits. Their families, particularly their children, are also directly affected. Therefore, criminal justice systems predicated on detention and incarceration, even for minor non-violent crimes, can themselves represent a significant obstacle to access to justice for persons living in poverty. Those who are poor and vulnerable are likely to leave detention disproportionately financially, physically and personally disadvantaged.

Fees and costs

51. In addition to the costs of legal assistance (see paras. 60-67 below), there are numerous other costs associated with accessing justice which constitute a major barrier for the poor, who simply cannot afford those expenditures. Fees are encountered at every stage of the legal process, along with several indirect costs, such as for obtaining a legal document, witness costs, commissioning independent expertise, photocopies and phone calls. The cumulative impact of those costs is a

¹⁴ E/CN.4/2006/7, para. 66.

crucial factor preventing the poor from accessing and benefiting from the justice system.

52. Costs are particularly burdensome in criminal cases, where defendants must often put up large sums of money to be granted bail, or risk long periods of pretrial detention, during which they may have to pay for food or telephone use. Those fees can have the effect of prolonging an individual's detention and exacerbating the conditions in which he or she is detained. Moreover, they result in a situation in which criminal defendants with financial means are in a much more favourable position than those without.

53. In civil claims, fees are payable when claims and motions are filed or when time limits are exceeded. In addition, the unsuccessful party in a civil case is often ordered to pay the legal costs of the successful party. Such fees are unaffordable for persons living in poverty and act as a disincentive to instituting claims. For example, in some countries the cost of divorce proceedings, including child custody claims, or of filing a land inheritance claim is many times the monthly income of a person living in poverty, and presents an even greater barrier for poor women.

54. The existence of administrative and other fees disproportionately disadvantages women, who often have less financial independence or access to financial resources. Women's access to the judicial system to determine civil claims with respect to divorce, child custody and land inheritance is impeded when excessive fees are imposed. Women living in poverty may also be prevented from filing criminal charges for domestic violence, rape or other forms of gender-based violence because they are unable to afford the fees incurred.

55. In addition to formal administrative fees, persons living in poverty encounter other collateral costs in accessing justice. The cost of transportation to courts and of accommodation, together with the loss of income while away from employment or subsistence activities, may be impossible for the poor.

56. Those costs are particularly severe for persons who live in rural areas, who may have to travel for days to access the justice system. Individuals who have informal or precarious work are unlikely to obtain their employer's permission to take time off to attend a hearing, even if they are willing to forego pay. Attendance would mean they risk losing their jobs and income altogether. Caregivers, the majority of whom are women, may not be able to leave home to submit a claim or to attend a court hearing.

Corruption

57. In many countries, partly owing to overstretched and underfunded judicial systems, corruption is rife throughout police forces and prosecution corps, and among judicial officials. Illicit payments and favours enable those with financial and social capital to access the justice system with greater efficiency and effectiveness, and even to secure a certain outcome. In contrast, persons living in poverty, who cannot afford to pay bribes for services that should be free, have their claims and cases delayed, denied or discontinued.

58. Persons living in poverty are more likely than other individuals to be confronted with requests for bribes and to resort to paying bribes.¹⁵ Moreover, bribes represent a greater burden for persons living in poverty, often meaning that they have to sell assets or sacrifice their health or education in order to meet such demands. Evidence shows that women are more likely to be affected by demands for bribes within the justice system¹⁶ and in many cases they are also subject to harassment or abuse by law enforcement officers.

59. Persons living in poverty are not only denied access to justice when they are unable to meet the cost of bribes or of engaging in other corrupt activities, but they are also deterred from accessing the justice system when they perceive the system to be corrupt.

D. Non-existent or inadequate legal assistance

60. The right to legal assistance, enshrined in many major global and regional human rights instruments, is essential for ensuring due process and equality before the courts. The provision of free and competent legal advice and assistance to those who are otherwise unable to afford it is a fundamental prerequisite for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms.

61. International human rights law explicitly establishes the right to free legal assistance in criminal proceedings (International Covenant on Civil and Political Rights, art. 14). This is particularly important for those living in poverty, who face a range of obstacles in negotiating bail procedures, pretrial detention, trials and sentencing, and appeals. Nonetheless, free legal aid should not only be provided in criminal matters, but also in civil matters when individuals do not have sufficient resources to pay for legal assistance and, without such assistance, they are prevented from asserting their rights.¹⁷ For example, when domestic law requires that individuals be represented by counsel to access judicial protection, the failure to provide free legal aid to persons without financial means would constitute a violation of the right to a fair trial and to effective judicial protection.

62. Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions. Indeed, exclusion of certain categories of claims from the scope of free legal aid, such as housing or immigration proceedings, or exclusion from representation before quasi-judicial tribunals, such as welfare or employment appeal boards, discriminates against the poor. Moreover, the legal

¹⁵ *Report on the Transparency International Global Corruption Barometer 2007* (Berlin, Transparency International, 2007).

¹⁶ UN-Women Report 2011-2012, p. 54.

¹⁷ Human Rights Committee, General Comment No. 32, para. 10; draft universal declaration on the independence of justice, art. 95; Basic Principles on the Role of Lawyers, principle art. 1. This right is also well established in some regional mechanisms, see e.g. European Court of Human Rights, *Airey v. Ireland* (Application No. 6289/73) and *Steel and Morris v. The United Kingdom* (Application No. 68416/01); and Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90, August 10, 1990 (Ser. A) No. 11 (1990).

processes which relate to such civil matters are often extremely complex and their requirements onerous, creating insurmountable obstacles for those without the assistance of a lawyer, particularly if the State or other party enjoys such assistance. This is particularly troubling with respect to civil matters involving the most vulnerable groups, such as indigenous peoples, persons with disabilities and ethnic minorities, who often face serious deprivations and violations of their rights, and lack the means or ability to contest them.

63. Women face compounded difficulties in accessing legal aid in criminal and civil matters. This has a particular impact on poor female victims of criminal offences such as domestic violence, or those pursuing divorce, child custody or land inheritance.

64. Often, the criteria which govern access to State-funded legal assistance are arbitrary and overly restrictive, and rely heavily on means-testing to determine eligibility.¹⁸ Means-testing is often inaccurate and is unable to take account of the wealth distribution within a household, disadvantaging those who have restricted access to household wealth, such as women and older persons. Furthermore, it fails to realistically reflect the options faced by persons living in poverty; for example, it may disqualify individuals if they have the option of disposing of household assets, even if those assets are used to produce food and generate subsistence income for the household.

65. The quality of legal services available to persons living in poverty is significantly undermined by the inadequate allocation by States of human and financial resources to legal aid services. In many instances, the fees legal aid lawyers are paid are far from commensurate with the amount of time and effort required to effectively litigate a criminal or civil case. Legal aid lawyers are often in short supply and overstretched. Legal aid providers therefore have to turn down a large proportion of deserving applications. In many countries, the number of applications for civil legal aid has risen, while resources allocated to legal aid have decreased. The lack of funding also dramatically impedes the quality of free legal services, as legal aid lawyers may be very inexperienced.

66. Even where legal aid services are available and adequately funded, discrimination in their design and implementation impedes certain individuals and groups from accessing them. For example, some rely on telephone intakes or written applications, failing to take into account the needs and constraints of persons with disabilities, older persons or those with lower levels of literacy. Inadequate or piecemeal support directed towards community-based paralegal programmes also restricts an important and more affordable source of legal assistance. Although all aspects of the legal profession should be regulated, excessive restrictions on the operation of paralegals, or lack of official recognition of their role, can also hamper the support they provide to persons living in poverty.

67. As well as quality and accessibility, the timing of legal assistance is of great importance. Often, when the poor are accused of criminal offences, they do not have access to a lawyer or paralegal until a trial is imminent. However, lawyers can play a crucial role at the time of arrest and during pretrial stages, especially in cases where the accused does not have access to legal information or financial resources for bail. As well as being in the interests of justice, timely legal intervention benefits the legal system as a whole, improving efficiency and reducing delays.

¹⁸ *Programming for Justice: Access for All* (see footnote 2 above), p. 143.

E. Structural problems of judicial processes

Excessive delays

68. Owing to lack of adequate resources and qualified staff, limited budgets and inadequate infrastructure and logistical support, there are often unnecessary delays in adjudicating cases and enforcing judgements. In some jurisdictions, millions of legal cases are pending and civil and criminal cases take up to a decade to be completed.¹⁹

69. While those problems affect all people seeking justice through the formal justice system, they have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation. Often their cases are underprioritized owing to biased preferential treatment of the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimants.

Formalism

70. Without the resources to retain private legal assistance, and with restricted access to legal aid (see above), persons living in poverty are often forced to navigate the judicial system alone. In doing so, they encounter, in addition to the barriers listed above, a complex labyrinth of laws, traditions and interactions, with copious paperwork, the use of legal jargon and mainstream languages, and restrictive time limits, all of which can deter the poor from seeking justice under formal systems and impede fair outcomes.

71. Those barriers are particularly damaging in areas of law that frequently have an impact on the most marginalized, including property disputes, welfare claims and immigration proceedings, and have the effect of preventing the commencement of claims to enforce rights and seek remedies.²⁰ Even when they do not bar engagement with the judicial system altogether, cumbersome and complex procedural requirements may still obstruct access to justice by increasing the financial and time costs.²¹

72. Persons living in poverty are unfamiliar with, and often intimidated by, regulations regarding dress codes, the hierarchy of the court system, confrontational courtroom design, and traditions about when to sit, stand and address the judge. As a result, they are in an unequal and disadvantaged position before they even walk into the courtroom.

73. Requirements that demand a high level of evidentiary proof before civil claims can be instituted can have a disproportionate impact on the poor, who are hampered by their lack of financial resources, time and understanding of the law and of legal processes. Collating evidence, obtaining expert opinions and preparing forms in the

¹⁹ See, for example, UN-Women Report 2011-2012, p. 54, and United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa, Survey Report* (New York, United Nations, 2011), p. 13.

²⁰ "Investigating the links between access to justice and governance factors: an objective indicators approach," United Nations Office for Drug Control and Crime Prevention Global Programme against Corruption, Research and Scientific Series, May 2001, p. 4.

²¹ E/CN.4/Sub.2/2001/7, para. 19.

correct language can be an almost impossible process without the assistance of a competent legal representative.

74. Persons living in poverty are even further disadvantaged when they are conducting proceedings or making a claim against corporate entities or the State, whose power, reach and resources far outweigh theirs. This is particularly evident in criminal cases, where the State controls the collation and production of evidence. The process of collecting exculpatory evidence or obtaining expert testimony may prove prohibitively costly for the poorest and most vulnerable individuals and is even more difficult for those forced to remain in pretrial detention because of their inability to make bail or pay the necessary bribes. In such cases, individuals have little hope of having their charges fairly adjudicated at trial.

Differences in language and culture

75. While many people find it difficult to understand legal or judicial terminology, the complexities increase for many persons living in poverty in multilingual and multi-ethnic societies where legal proceedings are often conducted in a language that they do not understand.

76. This can constitute a significant barrier for the poorest and most marginalized, many of whom speak local languages or dialects, as well as for indigenous populations, ethnic minorities and migrants. In particular, those who are often excluded from education services, including women, are less likely to have received adequate schooling in the official or predominant language.

77. Despite States' obligation to ensure that individuals facing a criminal charge have access to a free interpreter (International Covenant on Civil and Political Rights, art. 14.3 (f)), often this service is limited, unavailable or reserved for those who speak a foreign language, rather than a minority language or local dialect, and is rarely provided in civil cases. The issue of language disproportionately disadvantages women, who are not only less likely to speak the predominant language and require an interpreter, but who are also vulnerable to abuse or exploitation by interpreters, whose cultural prejudices may inform their translation.

78. Even when the predominant language is spoken, cultural differences can impede communication within the judicial system. In addition to imbalances of power, in some cultural groups, different terminology may be used for specific occasions or to speak to people in a different relationship, and time and place may be described in different ways. Furthermore, intercultural communication between indigenous groups or ethnic minorities and judicial officers can be impeded by differences in perceptions of politeness; cultural taboos which prevent the giving of certain evidence; and reliance on interrogatory methods. When judicial processes do not adopt measures to facilitate cross-cultural communication and adapt to cultural differences, this may contribute to higher rates of conviction on criminal charges, undermining the right to a fair trial.

Lack of legal standing

79. Legal standing is the gateway for access to justice. To have access to the formal judicial system, it is necessary that the courts extend legal standing without discrimination, ensuring that all receive equal treatment when bringing claims, protesting violations or seeking remedies.

80. In practice, however, restrictions on legal standing in many States directly and indirectly exclude persons living in poverty from accessing judicial and adjudicatory mechanisms. For example, in some States, legislatures and judicial systems limit standing for certain groups, such as women and children. Discriminatory laws deprive women of legal competency and require that they be under male guardianship before instituting a claim or giving evidence.

81. In addition, narrow rules relating to legal standing prevent civil society organizations from taking a more direct role in litigation, or engaging in judicial proceedings on behalf or in support of persons living in poverty and other vulnerable groups (with their permission), who may lack the resources or capacity to do so themselves. For example, in 10 European Union member States, the domestic rules on legal standing are considered overly restrictive and therefore represent a major obstacle to the right to access justice. In those States, individuals cannot bring a claim to court unless they have full legal capacity (which often excludes those with certain disabilities) and are directly concerned in the matter.²²

82. The presence of civil society in the judicial context can greatly improve the system. The ability of civil society organizations to support victims or bring cases on their behalf can reduce the financial and personal burden of legal action on the individual claimant. State restrictions on public interest litigation or on the filing of *amicus* briefs by civil society organizations can close off other avenues for access to justice for persons living in poverty. This is especially so in terms of remedy for structural or systemic abuses or discrimination, which affect large numbers of persons living in poverty.

Limited impact of litigation

83. In many jurisdictions, the effect of judgements is limited to those who litigate or bring a claim, even in cases that have a much wider significance. This means that only those individuals with the capacity or tenacity to overcome all the barriers to accessing justice will benefit from important judgements. Often, however, those living in poverty are affected by widespread practices or broad Government measures that generate situations where the rights of many individuals are at stake and which would be better addressed by collective remedies.

84. Implementation of a collective litigation mechanism by which findings and benefits are generalized beyond the actual litigants can ensure that human rights become meaningful for large numbers of people, even when those whose rights are being violated are not aware of the violation (or the rights). It can also draw the attention of the authorities to their constitutional and legal obligations regarding human rights.²³ In legal systems where courts have the power of judicial review or of issuing *erga omnes* judgements, which can declare certain laws or a state of affairs unconstitutional, this can have a positive effect in terms of securing justice for persons living in poverty.

²² *Access to Justice in Europe: An Overview of Challenges and Opportunities* (European Union Agency for Fundamental Rights, 2010), p. 40.

²³ *Programming for Justice: Access for All* (see footnote 2 above), p. 88.

F. Challenges in ensuring human rights are upheld in informal justice systems

85. Considering that the formal justice system is often remote or difficult to access for persons living in poverty, their grievances are often resolved outside the formal justice system through alternative dispute resolution systems, including those based on traditional, customary or religious law. Indeed, research shows that people living in poorer communities are more likely to resort to informal justice systems; in some countries more than half of all legal disputes are resolved in this manner. For persons living in poverty, resolving disputes through a means other than the formal system is not necessarily due to preference but rather to the lack of choice available to them because of the inaccessibility of the State legal order, or to social or economic compulsion.²⁴

86. Informal justice systems are often more accessible to persons living in poverty and may have the potential to provide quick, affordable and culturally relevant remedies.²⁵ However, informal justice mechanisms frequently exhibit some of the same weaknesses as State systems. For example, they may exclude women, minorities and disadvantaged groups, be susceptible to corruption and abuse of power, require payment from claimants or impose heavy fines, and in some there may be frequent lengthy delays in deciding cases.²⁶

87. The complexity of plural legal orders is likely to privilege those who are well informed and wealthy, and disadvantage those who are poor or marginalized, as often occurs in the formal State justice system. Moreover, informal justice mechanisms can act as a barrier to meaningful justice, particularly for the poorest and most disadvantaged community members, often reinforcing existing power structures and promoting elite domination and influence. In some cases, non-State justice mechanisms prioritize the interests of the community over the interests of the individual, which may have the effect of exacerbating the situation of the worst off in the community. Rarely do informal mechanisms take into account the legal rights of the individuals involved or consider international human rights standards.

88. Customary and traditional justice systems can also threaten women's access to fair and equal justice. Informal justice systems based on custom, tradition or ethnic or religious identity often contain unequal provisions for women and men, do not have sanctions against gender-based violence or other abuses which take place in the domestic sphere, and are sometimes procedurally biased against women. This is especially problematic as it is family laws and property laws that are most often subject to the jurisdiction of such legal systems.

89. Sometimes such systems also impose extremely punitive measures for the commission of even minor crimes. Moreover, while non-State legal orders may often be praised for providing rapid justice, speedy justice proceedings are by no means always just, and indeed many have features that constitute human rights violations by omitting basic due process guarantees.

²⁴ Indigenous peoples have specific rights regarding the maintenance and development of their own legal institutions and juridical systems: Declaration on the Rights of Indigenous Peoples (arts. 5, 34 and 40).

²⁵ *Doing Justice: How Informal Justice Systems can Contribute* (United Nations Development Programme and Oslo Governance Centre, 2006), p. 5.

²⁶ *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Versoix, Switzerland, International Council on Human Rights Policy, 2009), p. 53.

90. Despite challenges in informal justice systems, it is also important to note that State attempts to suppress the use of such systems can have severely detrimental effects on access to justice by the poor.

IV. Conclusions and recommendations

91. States have a legal obligation to ensure that all individuals are able to access competent, impartial judicial and adjudicatory mechanisms equally and without discrimination. Access to justice is not only a fundamental right in itself, but it is an essential prerequisite for the protection and promotion of all other civil, cultural, economic, political and social rights.

92. Access to justice is essential for tackling poverty and protecting the human rights of persons living in poverty. Even mature democracies with well-functioning State institutions and technically inclusive and fair legal systems struggle to ensure de facto equal access to justice by those living in poverty. When the poor are unable to access justice equally and without discrimination, they are prevented from enjoying and claiming their human rights, and from seeking remedies to violations of their rights. This may exacerbate their situation, or frustrate their efforts to move out of poverty.

93. The principle of the indivisibility and interdependence of human rights requires States to address a range of intersecting and mutually reinforcing deprivations and obstacles which prevent access to justice for the poorest.

94. It is crucial to construct an inclusive justice system that is close to the people, both socially and geographically. Ensuring access to justice for the poor requires well-functioning judicial systems and laws that do not solely reflect the interests of wealthy and more powerful groups but also take into account income and power imbalances. Reforms must be implemented with the effective and meaningful participation of persons living in poverty.

95. Given the great diversity of social contexts, there is no "one size fits all" solution for ensuring access to justice for persons living in poverty. Differing national and local contexts create a variety of challenges and opportunities for reform that must be taken into account. Success in all contexts, however, will share the features of a human rights-based approach. Solutions require tackling not only legal obstacles but also a range of extralegal factors: social, economic, cultural, linguistic, etc. Solutions must be sought at local levels, designed and implemented with the active participation of the communities affected. Therefore, policymakers and legal authorities should have a specific contextual understanding of local legal institutions and the variety of obstacles on the ground that impede access to justice by persons living in poverty, and implement multidimensional solutions that can strengthen their agency and ensure their enjoyment of their rights. Special attention must be paid to women and groups that are particularly excluded, such as indigenous peoples, older persons and migrants. With this in mind, States must take immediate and effective action to ensure that persons living in poverty are not denied enjoyment of their human rights because of insurmountable obstacles which prevent them from accessing the justice system. To this end, the Special Rapporteur wishes to present the following recommendations.

96. States should:

Social and cultural obstacles

- Take positive measures to raise the capacity of poor and disadvantaged groups to ensure that they have full understanding of their rights and the means through which they can enforce them
- Actively disseminate legal and judicial information, for example about laws, legal decisions and policy decisions, to all without charge and in multiple formats and languages
- Ensure that civil society and community-based organizations are able and supported to advocate for the rights and inclusion of persons living in poverty, undertake non-formal legal education, disseminate general legal information and serve as independent monitors of judicial systems
- Address the practical factors that impede women's ability to claim their rights, including the status of women and gender-based stereotypes, prejudices and norms

Legal and normative obstacles

- Review or abolish legislation that directly or indirectly discriminates against the rights, interests and livelihoods of persons living in poverty
- Ensure that laws give due weight and consideration to the interests of persons living in poverty and the abuses which affect them
- Establish mechanisms to oversee the legality and reasonableness of administrative and policy decisions that have an impact on the enjoyment by the poor of their rights
- Make all efforts necessary to register all children immediately after birth, and identify and remove barriers that impede the access of the poor to registration, in particular groups that suffer multiple forms of discrimination; registration must be free, simple and available at the local level
- Ensure that all forms of gender-based violence, including domestic violence, are criminalized and are subject to appropriate and enforceable criminal sanctions; develop specific strategies and systems to tackle gender-based violence perpetrated against persons living in poverty, including by providing shelter for victims of domestic violence

Institutional and structural obstacles in the justice chain

Physical access

- Expand the geographical reach of the justice system (police, prosecutors, courts, legal aid, etc.) in particular in rural and remote areas, by:
 - Considering innovative measures such as mobile courts, one-stop justice shops, street clinics and homeless courts to increase practical access to justice for persons living in poverty, particularly the homeless and those living in rural communities

- Creating incentives for police officers and other officials to take postings in rural and remote areas, and attracting well-trained legal professionals to those areas
- Taking steps to improve the physical accessibility of courthouses and police stations in order to ensure that persons with disabilities and others experiencing mobility issues are able to access them

Inadequate capacity

- Allocate sufficient financial and human resources to ensure the efficient and effective functioning of all organs of the judicial system, including police stations, prosecution corps and courts
- Provide training and education programmes for judicial officers, judges, lawyers, prosecutors and the police focusing on the rights and particular needs of the poor
- Ensure that adequate accountability mechanisms are in place to investigate and remedy any abuse or discrimination by law enforcement or judicial officers against persons living in poverty
- Create integrated and specialized services to address women's access to justice and ensure more efficient handling of gender-related crimes, including, for example, domestic violence courts and one-stop shops for sexual violence survivors; such services must be accessible and affordable for women living in poverty

Stigma

- Sensitize all justice service providers to the rights, needs and constraints of persons living in poverty, particularly the most vulnerable groups, by addressing negative stereotypes of the poor, including through performance evaluation, education and sensitizing the media

Excessive detention

- Review and reform detention and incarceration systems to ensure that they do not have a disproportionately harsh impact on those living in poverty
- Ensure that lack of financial resources does not negatively affect a person's chances of accessing justice in a fair and equal way during pretrial detention, for example regarding bail procedures, conditions of detention or accessing legal assistance

Fees and costs

- Put measures in place to ensure that legal, administrative and procedural fees relating to access to justice are waived for those who cannot afford them, including in small claims cases
- Ensure maximum use of available resources to provide progressively prompt and effective procedures to allow persons living in poverty to seek financial assistance to cover travel, accommodation and other costs associated with engaging with the justice system

Corruption

- Take strong measures to eliminate corrupt practices in the justice system and in law enforcement, including the solicitation of bribes; such measures might include legislation criminalizing all forms of corrupt acts, dedicating resources to policing and prosecuting corrupt officials, requiring judges to make declarations of the assets, improving the working conditions and salaries of police and judicial officers, and improving mechanisms to ensure the transparency of judicial processes

Legal representation

- Ensure that persons living in poverty have practical and effective access to competent legal advice and assistance when needed for the protection of their human rights, including by making available sufficient resources to provide high-quality legal aid
- Ensure that legal aid is promptly provided to all arrested or detained persons who cannot afford to retain a lawyer; free legal assistance should be available at all stages of the criminal justice process, including during initial questioning and pretrial detention
- Ensure access to free and competent civil legal assistance for persons living in poverty where the enjoyment of human rights — civil, political, economic, social and/or cultural — is at stake
- Ensure that legal aid lawyers are independent, adequately trained and remunerated, and meet the highest standards of the legal profession
- Enhance legal skills and knowledge within local communities by, for example, funding and training quality paralegals at the local level
- Ensure that lawyers and paralegals have access to people living in poverty who require their services in police stations, pretrial detention and prison facilities
- Ensure that legal aid application procedures take into account the individual experiences, needs and constraints of the poor; eligibility must not be assessed on the basis of household income where the applicant does not have practical access to household resources

Structural problems of judicial processes

Excessive delays

- Allocate sufficient financial and human resources to ensure the efficient and effective functioning of all organs of the judicial system, including police stations, prosecution corps and courts
- Ensure that cases where the rights of persons living in poverty are at stake are not subject to long delays which might exacerbate their situation
- Ensure the effective enforcement of judgements and compliance with judicial rulings in favour of persons living in poverty

Formalism

- Take measures to reduce the complexity of legal processes and minimize and streamline rules and procedures to make them more accessible for those unfamiliar with the traditions and rules of those processes

Differences in language and culture

- Ensure that, in linguistically plural societies, court processes operate in languages used by the poorest communities where necessary and can adapt to intercultural communication
- Provide free interpreters in civil and criminal cases for those who require but cannot afford them

Legal standing

- Ensure that courts extend legal standing without discrimination to all persons regardless of, *inter alia*, their gender, ethnicity, legal status or lack of formal legal registration
- Take measures to ensure broader criteria for standing in courts, allowing civil society organizations and national human rights institutions to bring cases on behalf of or in support of persons living in poverty
- Allow and support collective litigation when structural or systemic issues affect the rights of persons living in poverty

Limited impact of litigation

- Ensure the possibility of strategic (public interest) litigation to challenge national laws or policies, to demand enforcement of existing laws or to strike down discriminatory laws that affect the poor
- Allow class action suits, or alternative mechanisms for bundling claims, and in relevant areas permit socially relevant litigation to have *erga omnes* effects, to ensure that those who do not have access to courts can benefit from judicial decisions

Informal justice systems

- Support mechanisms for alternative dispute resolution, where appropriate and in line with international human rights standards, ensuring that such mechanisms do not pose an obstacle to accessing the formal justice system for those that need or prefer it
- Ensure that informal justice systems operate in a manner consistent with human rights standards and that there are regulatory mechanisms to prevent and sanction abuses of power and corruption
- Ensure that serious crimes, including gender-based crimes or sexual violence, are dealt with within the formal justice system
- Continue to extend and expand equal access to the formal justice system for persons living in poverty, even in areas where non-State legal orders operate